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No. 861

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

THE MIAMI TRIBE OF OKLAHOMA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Claims.

OPINIONS BELOW

The opinion of the Indian Claims Commission (App., *infra*, pp. 31–55) is reported at 6 Ind. Cl. Comm. 552. The opinions of the Court of Claims (App., *infra*, pp. 12–30) are reported at 281 F. 2d 202.

JURISDICTION

The judgment of the Court of Claims was entered July 15, 1960 (App., *infra*, pp. 12, 29). A timely motion for rehearing was overruled on November 2, 1960. An extension of time to April 1, 1961, within which

to apply for a writ of certiorari, was granted by the Chief Justice on February 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1) and Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s.

QUESTION PRESENTED

Whether, under the Indian Claims Commission Act, an Indian tribe is now entitled to additional compensation, equivalent to interest, because payments by the United States provided by treaty for the surrender of tribal land and other rights were made in installments rather than as a lump sum at the time of the treaty.

TREATY PROVISION INVOLVED

Article 3 of the Treaty of 1854 with the Miami Tribe provides, in relevant part (10 Stat. 1094–1095):

> In consideration of the cession hereinbefore made, the United States agree to pay to the Miami tribe of Indians the sum of two hundred thousand dollars, in manner as follows, viz: twenty annual instalments of seven thousand five hundred dollars each, the first payable on the first day of October, one thousand eight hundred and sixty, and the remainder to be paid respectively on the first day of October of each succeeding year, until the whole shall have been paid; and the remaining fifty thousand dollars shall be invested by the President in safe and profitable stocks, the interest thereon to be applied, under his direction, for educational purposes, or such objects of a beneficial charter, for the good of the tribe, as

> may be considered necessary and expedient; and hereafter, whenever the President shall think proper, the sum thus provided to be invested, may be converted into money, and the same paid to the tribe in such manner as he may judge to be best for their interests. * * *

Article 4 of the treaty is printed in the Appendix, *infra*, pp. 56–59.

STATEMENT

The Court of Claims has reversed a holding of the Indian Claims Commission rejecting claims of the Miami Tribe, and directed entry of judgment for $413,900, Judge Whitaker and Chief Judge Jones dissenting. The facts relevant to the question stated above may be summarized as follows:

By treaty in 1854 the Miamis ceded some 254,000 acres of land in Kansas to the United States for a stated consideration of $200,000 payable in 20 annual installments of $7,500 each and a lump sum of $50,000 to be invested for the benefit of the Tribe (see *supra*). In this case, the Tribe claimed before the Indian Claims Commission that the consideration was so inadequate as to warrant recovery under the Indian Claims Commission Act, 25 U.S.C. 70a (3) and (5). The Commission rejected this claim, finding that the land had a fair market value in 1854 of $1.25 per acre, or $317,697.93, and that the consideration of $200,000 was not unconscionable under the circumstances. The Court of Claims affirmed the $1.25 valuation but reversed the finding that the consideration was not unconscionable. It found that it was necessary to discount the $200,000, actually paid in

accordance with the terms of the treaty, because the payment of that sum in installments resulted in delay. The court valued the payments at $121,900 as of the treaty date (1854), held this amount unconscionably small, and ordered judgment for an additional $195,000.

The same discount process was used on another claim. By an 1826 treaty, the Miamis had been promised annuities which the Court of Claims held were permanent and amounted to $26,500 a year. To eliminate these charges, the treaty of 1854 provided for payment of a $25,000 annuity in 1854 and 1855, and in addition for payment of a consideration of some $421,000. The then value of a permanent annuity of $26,540, using a 5% interest rate, was $530,800. The Commission held that the consideration was not so inadequate as to be unconscionable.[1]

The Court of Claims reversed. It valued the consideration paid by the United States at $412,600 by the same discount process, and held this amount to be unconscionably small. Part of the $421,000 payment, *supra*, was to be made by establishing a trust fund, if the Indians desired it, which was to earn 5% interest (*infra*, p. 24). The treaty provided that this fund was to be

[1] The Commission said (*infra*, p. 40):

> In satisfaction and release of a claim of indefinite value, the parties agreed upon a specific sum which was forthcoming at a time when the tribe was passing from a communal mode of living to that of individual allotments and was faced with the expense incident thereto. Under the circumstances disclosed, we can not say that the $471,438.68 consideration was unfair or dishonorable, or that it fell so far short of the true value of the annuities commuted as to be unconscionable.

created on July 1, 1855, which was a year and one month after the treaty was signed by the Indians. The Court of Claims discounted this fund for 13 months, referring to it as "such delayed investment" (*infra*, p. 24). Most of the balance was payable, as the Court of Claims says, "in five annual installments of $31,739.11, without interest." This the court discounted at 5% to reduce the amount it considered to have been paid by $21,000. The court also valued the second of the $25,000 payments at $23,700 because of one year's delay.

REASONS FOR GRANTING THE WRIT

This case, together with *United States* v. *The Crow Tribe of Indians* and *United States* v. *The Absentee Shawnee Tribe of Oklahoma*, in which petitions for writs of certiorari are being filed at the same time as this petition, represent different applications of the same basic ruling of the Court of Claims. This ruling is incorrect and sharply conflicts with established principles as to interest against the government. The departure by the court below from these settled rules is important to the remaining cases under the Indian Claims Commission Act and also to the general field of claims against the United States. Review by this Court is fully warranted.

1. Since earliest days the rule has been followed, without exception, that, apart from claims under the Fifth Amendment, claims against the United States do not bear interest unless there is statute or contract so providing, and Congress has at no time generally provided for interest on all claims. See *Smyth* v.

United States, 302 U.S. 329, 353, and cases there cited. The nature of interest in this setting was explained by Attorney General Wirt as being "in the nature of damages for withholding money which the party ought to pay, and would not or could not." 1 Op. A.G. 268. The rule applies "whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application." *Angarica* v. *Bayard*, 127 U.S. 251, 260; *United States* v. *Hotel Co.*, 329 U.S. 585; *United States* v. *N. Y. Rayon Co.*, 329 U.S. 654, 659–660.

Indian cases form no exception. One of the most recent applications of the rule is *United States* v. *Tillamooks*, 341 U.S. 48, in which this Court reversed an order to pay interest on a claim of an Indian tribe arising under a special jurisdictional Act. Prior to the present case, the rule had been uniformly applied both to Indian claims under special jurisdictional Acts and to those asserted under the Indian Claims Commission Act, *e.g.*, *Cherokee Nation* v. *United States*, 270 U.S. 476, 490 (holding that interest could not be allowed for a delay of Congress in appropriating an amount due under an agreement); *Loyal Creek Indians* v. *United States*, 118 C. Cls. 373, 383; *Quapaw Tribe of Indians, et al.* v. *United States*, 128 C. Cls. 45; *Kiowa, Comanche and Apache Tribes* v. *United States*, 143 C. Cls. 534. In the case of Indian claims there is additional reason for denying interest. Indian tribes enjoy the same sovereign immunities as does the United States. *United States* v. *U.S. Fidel-*

ity Co., 309 U.S. 506. In 1822 the Attorney General disallowed interest on claims asserted against the Creek Nation which had been assumed by the United States, saying (1 Op. A.G. 550, 551):

> 2. The claim ought to be liquidated against the United States exactly on the principle that it would be liquidated against the Indians; and it is believed that a claim of interest against a nation of Indians, under circumstances like these, would be unprecedented.[2]

2. However formulated, it is plain that the Court of Claims' holding is that additional charges are imposed upon the United States because payments were delayed beyond the time the debt was acknowledged. The opinion refers to the establishment of the trust fund as "delayed" investment. App., *infra*, p. 24. Except for changes in the purchasing power of the dollar (which no one considers should be the basis of recovery), the value of the dollar consideration is the same in 1854, 1884, or even the present time, except for damages for delay in payment, *i.e.*, interest.[3] If

[2] He also stated (p. 551):

> 3. Interest is not a thing of course; it is no part of the debt, nor is it a necessary consequence of the debt. By many nations it is not allowed at all; and by those whose laws allow it among individuals, it is not allowed in every case, but only where the circumstances of the case call for its allowance, as a matter of equity in the particular case. These principles are nowhere more clearly stated, nor more ably illustrated, than in Mr. Jefferson's letter to Mr. Hammond. (State Paper, vol. 1, p. 304.)

[3] While is does not appear on the face of the opinion, interest was in fact compounded in this case because of the table used by the Court of Claims. This was clearly erroneous. *Cherokee Nation* v. *United States*, 270 U.S. 476, 490; *United States* v. *Isthmian S. S. Co.*, 359 U.S. 314.

nothing at all had been paid by the United States, the rule excluding interest would indisputably limit the consideration for the 1854 cession to the $200,000 unpaid. *United States* v. *Tillamooks,* 341 U.S. 48. But because, under the terms of the treaty, full payment was delayed, the Court of Claims, by allowing only a $121,900 credit, has made the United States pay an additional $78,100 in the case of the Miami 1854 cession. Applied to the facts of the *Tillamooks* case, this ruling would mean that, if part payment had been made in 1900, it would have been discounted to 1855, producing the same result as if interest were added since 1855—thus imposing greater liability when the United States has made part payment than when it has made no payment.[4]

The *Crow, Miami,* and *Shawnee* decisions show that the Court of Claims has applied this discounting process mechanically to all three cases as "a matter of law" (*infra,* p. 19). The holdings cannot be explained as constituting simply a conclusion as to "fair and honorable dealings" or "unconscionable" transactions on the particular facts of each case. Moreover, the Indian Claims Commission Act provides that the Commission "shall make appropriate deductions for all payments made by the United States on the claim * * *," 25 U.S.C. 70a. No discre-

[4] To support its result, the Court of Claims charged the government with inconsistency because of the process of computing the lump sum value of the permanent annuity. App. *infra,* p. 19. But perpetual annuities have the same value regardless of what has been paid in the past. The same result would be reached in 1854, 1874, or at the present time. No element of delay in payment is involved in such cases.

tion in this regard is vested in the Commission, or in the Court of Claims on appeal. But the holding here allows the United States only $121,900 credit for the $200,000 it paid on the claim for cession of lands and only $412,600 credit for the $421,000 paid for commutation of the annuities. In addition, under the Act, offsets are allowed for certain items spent for the benefit of the tribes. 25 U.S.C. 70a. On the court's reasoning, the value of these offsets could also be discounted as of the date the obligation arose. This would greatly affect the liabilities of the United States. See, *e.g.*, *Choctaw Nation* v. *United States*, 91 C. Cls. 320. Offsets have always been computed without regard to when the payments were made. See, *e.g.*, *Quapaw Tribe of Indians, et al.* v. *United States*, 128 C. Cls. 45.

3. The question is important. The novel rule declared by the court below embraces almost every claim now pending under the Indian Claims Commission Act; at least some portion of the payment made by the government in the past was paid in installments in the case of almost all claims.[5] In addition, as indicated above, the recurring problem of offsets may well be affected.

The future effect of this ruling is also significant. The Court of Claims, under 28 U.S.C. 1505, has been vested with permanent jurisdiction as to Indian claims, without the broad authority given the Indian Claims Commission. The present ruling could be

[5] At the end of the fiscal year 1960, there were 463 cases pending before the Commission, the amount claimed being impossible to estimate. However, in that fiscal year, final judgments in 12 cases totalled $37,300,000.

asserted to apply in claims submitted to that court and to counterclaims and setoffs in such cases. 28 U.S.C. 2508.

Moreover, the reversal of the long-held rule against interest would certainly lead those Indian Tribes which have not enjoyed the benefits of the new rule in adjudication of their claims in the past, either by the Commission or under special jurisdictional acts, to seek additional legislation to permit relitigation of such claims. The general objective of the Indian Claims Commission Act, to settle once and for all these Indian claims, could thus be frustrated.

Especially in view of the history of the no-interest rule, *supra*, it will surely be argued that the new discount rule should equally apply to non-Indian cases. Thus, on the facts set forth in *United States* v. *Hotel Co.*, 329 U.S. 585, it would be argued that the $867,682 to be paid under the judgment of 1946 would have, under the theory of the Court of Claims' new rule, a lesser value in 1943 when government agents took over the hotel—hence, that the consideration provided by the contract was not paid in full. The same rule would also affect government contracts providing for installment payments or cases of postponement in payments because of delay in passage of appropriation acts.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
Attorney.

MARCH, 1961.

APPENDIX A

In the United States Court of Claims

Appeal No. 2–59

(Decided July 15, 1960)

THE MIAMI TRIBE OF OKLAHOMA, ALSO KNOWN AS THE MIAMI TRIBE AND HARLEY T. PALMER, FRANK C. POOLER AND DAVID LEONARD, AS REPRESENTATIVES OF THE MIAMI TRIBE, AND OF ALL THE MEMBERS THEREOF, APPELLANTS; IRA SYLVESTER GODFROY, ET AL., ON RELATION OF THE MIAMI INDIAN TRIBE AND MIAMI TRIBE OF INDIANA, AND EACH ON BEHALF OF OTHERS SIMILARLY SITUATED AND ON BEHALF OF THE MIAMI INDIAN TRIBE AND VARIOUS BANDS AND GROUPS OF EACH OF THEM, COMPRISING THE MIAMI TRIBE AND NATION, APPELLANTS v. THE UNITED STATES, APPELLEE

Mr. Edwin A. Rothschild for the appellants Miami Tribe of Oklahoma, et al. *Messrs. Edward P. Morse* and *Louis L. Rochmes* were on the briefs.

Mr. Walter H. Maloney for the appellants Ira Sylvester Godfroy, et al. *Mr. James N. Berry* was on the brief.

Mr. W. Braxton Miller, with whom was *Mr. Assistant Attorney General Perry W. Morton*, for the appellee.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

This is an appeal from a decision of the Indian Claims Commission (hereinafter called the Commission). The appellants, the Miami Tribe of Oklahoma (hereinafter called the Miami Tribe) and the Miami Tribe of Indiana (herein

referred to as the Indiana Miami) filed claims under the Indian Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C. §§ 70–70v, to recover additional compensation for certain lands which the Miami ceded to the United States by the Treaty of June 5, 1854, 10 Stat. 1093. Under that treaty, the Miami ceded all of their land located on the eastern border of Kansas, with the exception of 70,640 acres. The consideration to be paid to the Miami Tribe was described as $200,000, of which $50,000 was to be invested by the President of the United States for the benefit of the Miami Tribe, with the remainder to be paid to the Miami Tribe in twenty annual installments of $7,500, starting in 1860. No part of the consideration was to be paid to the Indiana Miami. The treaty also provided for commutation of tribal annuities which were payable to the Miami under earlier treaties. Payment for the commutation was to be made to both the Miami Tribe and the Indiana Miami.

The appellants claimed that the consideration they received in 1854 for their lands in Kansas and for the commutation of their annuities was unconscionable or inconsistent with fair and honorable dealings. They also claimed that they were entitled to be paid for more land in Kansas than they actually owned, since the United States had promised to give them more land than it did give them. Finally, they claimed interest on certain sums which they had been paid by the United States in 1891 to reimburse them for amounts which were rightfully theirs but which had been paid to other parties. The total amount claimed by the appellants was $1,092,799.28.

The Commission decided that neither appellant was entitled to relief, in an opinion rendered on July 14, 1958, reported at 6 Ind. Cl. Comm. 552. The Commission made findings of fact which are reported at 6 Ind. Cl. Comm. 513.

Prior to 1846, all of the Miami Indians lived in Indiana. In that year, pursuant to a treaty signed on November 28, 1840, 7 Stat. 582, a group of the Miami Indians moved to Kansas. The Miami Tribe are the descendants of those Miami who went to Kansas and remained there (and later moved to Oklahoma), while the Indiana Miami are the descendants of the Miami who remained in Indiana, or who went to Kansas but later returned to Indiana. An issue in

the case is whether the Indiana Miami are entitled to participate in any recovery for inadequate consideration received for the Kansas lands ceded to the United States in 1854. It is agreed that the Indiana Miami will participate in any recovery for inadequacy of consideration paid for the 1854 commutation of annuities. It must first be determined, however, whether there is to be any recovery. The Indiana Miami join with the Miami Tribe on issues relative to liability.

The issues in this case are (1) whether the consideration paid by the United States for the Kansas land ceded to it in 1854 was so inadequate as to entitle the Miami to recover under section 2(3) or 2(5) of the Indian Claims Commission Act, 25 U.S.C. §§ 70a (3) and (5); (2) whether the Miami were entitled in 1854 to be paid for 500,000 acres of Kansas land, rather than for the 324,796.88 acres which they actually owned, on the grounds that they had moved to Kansas on the understanding that the United States would give them 500,000 acres there; (3) whether the consideration paid for the commutation of certain annuities was inadequate; (4) whether the Miami are entitled to recover interest on sums which were paid to them in 1891 to replace allotments and payments which had been wrongfully made in 1858 and 1859 to spurious or unqualified Miami Indians; and (5) whether the Indiana Miami are entitled to share in recovery for the Kansas land.

The Commission found that the land ceded by the Miami on June 5, 1854, had a fair market value on that date of $1.25 per acre, or a total value of $317,697.93. It concluded that the Miami had received $200,000 therefor, and that this amount was "not an unconscionable consideration under the facts and circumstances surrounding its purchase on that date, and that petitioners are not entitled to relief under section 2(5) [the 'fair and honorable dealings' section] of the Indian Claims Commission Act." 6 Ind. Cl. Comm. 551. The Commission further concluded that the consideration paid the Miami for the commutation of their annuities in 1854 was not unfair, dishonorable or unconscionable; that the Miami were not entitled to recover for the number of acres by which the acreage they actually received under the 1840 treaty was less than 500,000, the number of acres the

Miami claim they had been promised; and that the Miami were not entitled to recover the interest they claimed on the funds which were misapplied in 1858 and 1859. It also held that the Indiana Miami had no interest in the Kansas land.

(1) THE ADEQUACY OF THE CONSIDERATION PAID FOR THE KANSAS LANDS UNDER THE 1854 TREATY

The Commission found that the Kansas lands were worth $1.25 per acre, $317,697.93 in total; the Miami claim they were worth not less than $2.40 per acre, $609,980 in total. The Commission concluded that the Miami received $200,000 for their lands; the Miami contend they received only $121,974.23. The Commission held that consideration of $200,000 for land worth $317,697.93 was not unconscionable; the Miami contend that since they received only $121,974.23 for land worth at least $609,980, they are entitled to recover $488,005.77, but they also argue that even if the Commission was correct about the values of the land and of the consideration, such consideration was unconscionable, or inconsistent with fair and honorable dealings.

In considering the controversy over the value of the land, it must be borne in mind that this court's jurisdiction on appeal is limited to determining

> whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. 25 U.S.C. § 70s(b).

The requirement that the Commission's findings of fact be "supported by substantial evidence" means that they must be supported by evidence which is substantial when whatever in the record which fairly detracts from its weight is taken into account. *The Osage Nation of Indians* v. *United States*, 119 Ct. Cl. 592, 603–614; *The Prairie Band of Potawatomi Indians* v. *United States*, Appeal No. 2–57, decided July 16, 1958, 143 Ct. Cl. —, 165 F. Supp. 139 (slip opinion, p. 21).

We think that, in this case, the Commission's finding as to the value of the land was supported by substantial evidence.

In 1856 the land was surveyed and classified as 13.3% Class I land (bottom, terrace and upland, with alluvial and dark residual prairie soil, having a slope of two percent or less), 65.7% Class II land (land with dark residual prairie soil over a clay subsoil, having slopes up to 12%), and 21% Class III land (land unsuited to agriculture, but which produces a good prairie hay). The tract as a whole had a 40% timber coverage of walnut, hickory, elm, sugar maple and other hardwoods on the uplands and sycamore along the streams. The coverage of the ceded lands was only 15%. The Osage River and its tributaries flow generally south and southeast through the tract. The principal use for this land appears to have been for small-scale farming.

Two expert witnesses testified on behalf of the Government. They based their opinions as to the value of the Kansas land primarily upon a comparison with a 350,000-acre tract of land in Missouri lying just to the east of the Miami lands, across the Kansas-Missouri border. The Government's expert Hall noted that similar and contiguous land in Missouri had been on the market, at $1.25 per acre, for years, but that it had not been sold. He derived a value of 35¢ per acre for the Kansas land, by taking into account deductions for advertising, delay in realizing upon investment, costs of financing transportation and other improvements, and similar items. The Government's witness Murray valued the Kansas land at 50¢ per acre. He found that the Kansas land was quite comparable to the Missouri tract, and noted that only 10% of the Missouri lands had been sold between 1843 and 1846, but that a sharp increase in sales occurred in 1853–1854. It appears that another 10% was sold in 1854, but that about 252,000 of the 350,000 acres, or 72% of the original Missouri tract, remained unsold in June 1854. It appears that there were 22,722,000 acres of unsold public lands in Missouri in June 1853, and that over 20,000,000 acres remained unsold in June 1854. Under the Pre-emption Act of 1841, 5 Stat. 453, settlers could enter upon 160-acre tracts of public lands and obtain preferential rights to buy

the land at $1.25 per acre. Military scrip and warrants applicable to land purchases were made assignable in 1852. They were credited at $1.25 for an acre of selected land, but could be obtained in 1854 for about $1.10 each. Public land in Kansas was, in general, held off the market until after July 1, 1857, because, it appears, the general land market in the area was saturated.

The appellants object to the finding that the general land market was saturated. They say that the availability of land in Missouri did not "saturate" the land market of eastern Kansas, and cite our statement in *Miami Tribe of Oklahoma* v. *United States*, Appeal No. 2-58, decided July 13, 1959, — Ct. Cl. —, 175 F. Supp. 926, slip opinion, p. 40, that material with respect to land available *throughout the United States* at the time of cession had no relevancy to the issue of value in that case. It is true that the amount of land available throughout the United States is irrelevant, but in this case we are concerned with evidence of the availability of large quantities of very similar land immediately adjoining the tract in question.

The Miami rely primarily upon a comparison between their Kansas lands and a 208,000-acre tract of land, lying immediately north of their own land, which was ceded by the Peoria and other Indians to the United States on May 30, 1854, 10 Stat. 1082. The Peoria tract was placed on the market in 1857, at an average appraisal of $1.66 per acre, and was completely sold within three weeks, for an average price of $1.67 per acre. The Miami argue that this price of $1.67 was considerably below the realistic market value of the land. They say the price was low because no competition was allowed, since most of the acreage was preempted by real or spurious settlers and their assignees. They point to the rapidity with which the land did sell, and to the average profits upon resale of at least 65¢ above appraisal.

There is, however, a significant difference between the Miami and the Peoria tracts which supports a conclusion that the Miami lands were worth less. The location of the Peoria tract was considerably more advantageous than that of the Miami tract, since it was nearer to Kansas City and Leavenworth, as well as to the Santa Fe Trail. At the time with which we are dealing here, such differences in location,

even if they do not seem very great by our current standards of distance, could have had significant effect upon land value. As the appellants note, certain lands ceded by the Iowa and Delaware Indians were appraised at higher values than the Peoria lands, "presumably because of advantages arising from their proximity to the Missouri and Kansas Rivers, the only navigable waterways."

Further, the sales of the Peoria lands did not take place until 1857. While these sales were made only three years from the time of the Miami cession, this was a turbulent and significant period in the history of Kansas, and we cannot say that conditions in 1857 were sufficiently comparable to those in 1854 to require a finding that the 1857 sale of the Peoria lands determines their 1854 value. While the Commission would have been justified in placing more weight on the evidence of the market value of the Peoria lands, we cannot say that its failure to do so was erroneous.

The Miami also point to certain sales of preemption claims to land within the Miami tract itself which were made in 1857 for $5.00 to $7.00 per acre and to sales of nearby trust lands for the Iowa and Delaware tribes for an average of $2.35 per acre in 1857 and $2.00 in 1867. Again, while we might have given more weight to these factors than did the Commission, we cannot say, in view of the differences in time and location, which may well have been quite significant, that the Commission erred in discounting their importance.

The appellants complain that the Commission erred by relying on the "wholesale theory" to value the Kansas land. We note that the Commission, in its opinion, indicated that it thought the valuation of the Miami land should take into consideration the value of the tract if it were to be sold as a whole, rather than the total of the values of such smaller tracts into which it might be divided. We have disapproved this "wholesale theory". *The Miami Tribe of Oklahoma* v. *United States*, *supra*, 175 F. Supp. 926, 953, slip opinion pp. 43–44. It does not appear, however, that the Commission has based its finding of value in this case upon this theory.

We conclude, therefore, that the Commission's finding that the Miami lands in Kansas were worth $1.25 per acre in 1854

is supported by substantial evidence. The value of the 254,158.34 acres which were ceded was $317,697.93.

It must next be determined how much the Miami received in 1854 for the cession.

The Commission erred as a matter of law when it concluded that the Miami Tribe received $200,000. It is true that the treaty described the consideration as $200,000, but the treaty also prescribed the method of payment. The value of consideration received, as well as the value of land ceded, must be determined as of the date of cession. The payment of $50,000 to be held at interest had a treaty-date cash value of $50,000. But $150,000 payable in twenty yearly installments of $7,500 commencing six years after the treaty date had a treaty-date value of only $71,974.23, which was the then present value of the right to receive such payments, on standard annuity tables, computed at a 5% interest rate. The treaty-date value of the consideration which the Miami Tribe received was therefore $50,000 plus $71,974.23, or $121,974.23.

The Government argues that to so hold would be contrary to what this court said in its opinion in the earlier case of *The Miami Tribe of Oklahoma* v. *United States*, *supra*, — Ct. Cl. —, 175 F. Supp. 926, 955–956, slip opinion pp. 47–48, to the effect that the payments on account of a limited annuity which had been allowed as payments on the claim in *The Quapaw Tribe of Indians* v. *United States*, 1 Ind. Cl. Comm. 644, 652, aff'd in part and rev'd in part, 128 Ct. Cl. 45, were "probably installments of a stated purchase price and as such, to the extent actually paid, represented the consideration for the cession and payments on the claim." That statement was made when the court did not have the issue before it, and does not have the force of a holding. After considering the question as it is presented in this case, we cannot say that the receipt of an undertaking to pay $7,500 a year for 20 years starting in six years amounts to a payment of $150,000. If the Indians were in the position of selling such an undertaking, the Government would be the first to point out that it was worth only its capitalized value. In fact, this is the very argument which the Government presents in this case in urging that its payment for the 1854 commutation of the Miami's annuities was adequate.

The Miami received $121,974.23 for land which the Commission found to be worth $317,697.93. This is unconscionable consideration. It is only 38% of the value of the land. It is true that there is no exact dividing line between what is unconscionable and what is not. The disparity between the price paid and the fair market value of the land must be very great. We think that the Commission was correct when it said in this case that payment of less than half the true value is unconscionable. The Miami are thus entitled to recover for the value of their land ($317,697.93), less the payment they received ($121,974.23), which difference is $195,723.70.

(2) WHETHER THE MIAMI SHOULD HAVE BEEN PAID FOR 500,000 ACRES IN KANSAS

The Miami claim that they should recover also for the difference between 500,000 acres, the number of acres in Kansas which they claim they were promised when they agreed to move west, and 324,796.88 acres, the amount of Kansas land they actually received. We cannot find any promise that the Miami would be given 500,000 acres in Kansas.

In 1833, when the Miami reservations in Indiana still included almost 1,000,000 acres, Government representatives told the Indians that the President was willing to give them, in exchange for their Indiana lands, as much land west of the Mississippi as they then had in Indiana. The Miami informed the Government representatives that they did not want to give up their reservation, and no agreement was reached.

Again in 1834 the Government attempted to obtain a cession of the Indiana lands, but the Secretary of War directed the Miami agent to offer only 300,000 acres in the west, and to give 800,000 acres only "in the last resort . . . if nothing short will satisfy them." By a treaty signed October 23, 1834, 7 Stat. 458, the Miami ceded 250,560 acres of their Indiana land, for a recited consideration of $208,000 but there was no provision made for land in the west.

It was in Article 10 of the treaty of November 6, 1838, 7 Stat. 569, by which treaty the Miami ceded more than 200,000 acres for a recited consideration of $335,680, that

the United States first agreed to possess the Miami with land west of the Mississippi. That Article provided:

> * * * the said country shall be sufficient in extent, and suited to their wants and condition and be in a region contiguous to that in the occupation of the tribes which emigrated from the States of Ohio and Indiana * * *.

No mention is made of 500,000 acres, or of a number of acres equal to those given up in Indiana. No western lands were given to the Miami under this treaty, but negotiations between the Government's Indian Agents and the Miami continued.

On November 28, 1840, Government representatives and the Miami concluded a treaty at the Forks of the Wabash, in Indiana, whereby the Miami ceded their remaining Indiana lands, about 491,000 acres, for a recited consideration of $550,000. 7 Stat. 582. Article 8 provided:

> It is hereby stipulated, that the Miami tribe of Indians shall be removed to the country assigned them west of the Mississippi, within five years from this date; * * *.

When the treaty was submitted to the Senate for ratification, it was amended, on February 25, 1841, by the addition of an Article 12, which read:

> The United States hereby stipulate to set apart and assign to the Miamies, for their occupancy west of the Mississippi, a tract of country bounded on the east by the State of Missouri, on the north by the country of the Weas and Kaskaskias, on the west by the Pottawatomies of Indiana, and on the south by the land assigned to the New York Indians, estimated to contain five hundred thousand acres. 7 Stat. 585.

The Miami subsequently, on May 15, 1841, assented to the amendment. 7 Stat. 585.

We cannot find, nor are we cited to, any evidence that the Government had promised to give the Miami land in Kansas equal in extent to the land they gave up in Indiana. What was promised was described in the 1838 treaty as country "sufficient in extent, and suited to their wants and condition."

There is a letter, dated May 29, 1854, from some Miami representatives to Commissioner Manypenny, where the Indians state:

> We were promised previous to our removal from Indiana, at the formation of our last treaty, a country west of large extent equal if not greater in quantity to the amount we disposed of, which was some 1½ million of acres. We were promised a country sufficient in extent to keep off at a distance the bordering and predatory tribes. We are fully of the opinion that these promises and pledges on the part of our Great Father was remembered when the estimated number of acres were designated in the amendment and ratification of our last treaty. They gave us the precise number of acres we sold in Indiana. We were promised a more extensive country, but an equal amount seemed to be the amount decided on by Congress. Their manner of designating the boundaries, not knowing the locality of the lands of the bordering tribes, is the cause of the unintentional deficiency of the stipulated treaty.

We do not think that the language of the 1840 treaty amounted to an engagement to assign to the Miami anything more than the area which was therein described by its boundaries. The mention of the estimated acreage was no more than it appears to be, a guess as to the size of the area which was to be assigned to the Indians.

Since, therefore, there was no promise to give the Indians 500,000 acres in Kansas, there was no shortage of acreage in the Kansas lands, and the Miami are not entitled to recover for the alleged shortage.

(3) THE COMMUTATION OF ANNUITIES

We next consider the commutation of the Miami annuities which took place under the 1854 treaty. We think that the consideration which the Miami received for the commutation of the annuities which the Government was obligated to pay, was inadequate. The annuities due the Miami in 1854 totaled $26,540 per year. It is agreed that the present cash value of a permanent annuity of $26,540, based on an interest rate of 5%, is $530,800. The Government contends, and the Indian Claims Commission agreed, that the Miami annuity of $25,000 under the treaty of October 23, 1826, 7 Stat. 300, was not a permanent annuity, since it is provided for in the treaty as follows:

> * * * a permanent annuity of twenty-five thousand dollars shall be paid to them (the Miamis), as long as

they exist together as a tribe; which several sums are to include the annuities due by preceding treaties to the said tribe.

We think that such an annuity has the value of a permanent annuity. The Government asserts that, because Congress might have been justified in declaring the tribal existence of the Miami terminated in 1873, the annuity's value in 1854 was that of a twenty-year annuity. It is hardly conceivable that the United States had the power, by its unilateral act, in effect to nullify this annuity. As for the tribe dissolving itself, it would not be expected that this relatively small band of Indians would purposely disable themselves from receiving their annuity. It was the policy of the United States at this time to encourage the assimilation of the Indians into the society, and this policy would hardly have been served by a provision which would end Indians' annuities upon their taking a step toward assimilation. The provision that the annuity, although permanent, be paid to the tribe as long as it existed together as a tribe presents a problem.

We must seek to give this treaty provision a meaning which will give effect to all of its language. "It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable." *Geofroy* v. *Riggs*, 133 U.S. 258, 270. "Now, it is the duty of courts of justice so to construe all statutes as to give full effect to all the words in their ordinary sense, if this can properly be done; and thus to preserve the harmony of all the provisions." *Bend* v. *Hoyt*, 13 Pet. 263, 272. All words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. *McDonald* v. *Thompson*, 305 U.S. 263, 266.

In order to give effect to the words "permanent annuity," the specification that payments be made to the tribe as long as it remained together as a tribe must be interpreted as a specification of the proper party to receive the annuity, rather than a limitation on its length. That is, the annuity was permanent, payable to the tribe so long as it existed together as a tribe, and payable thereafter to the various individual Miami.

This interpretation is strengthened by the fact that the various annuities which were consolidated by the 1826 treaty

had been described as "permanent" (treaties of August 21, 1805, 7 Stat. 91; September 30, 1809, 7 Stat. 113 and 115), "perpetual" (treaty of October 26, 1818, 7 Stat. 189, 191), and "forever" (treaty of August 3, 1795, 7 Stat. 49, 51). Also, the 1854 treaty described the annuity simply as "permanent." 10 Stat. 1096. We find, therefore, that the value of the annuities to which the Miami were entitled in 1854 was the value of a permanent annuity of $26,400, or $530,800.

We must next determine how much the Miami received for the commutation of these annuities. Article 4 of the 1854 treaty provided that a payment of $421,438.68 be made, $190,434.68 to the Western Miami and $231,004 to the Indiana Miami. However, the Miami were not to receive payments having a present value of $421,438.68. The Indiana Miami's $231,004 was to be invested for them at 5% starting July 1, 1855, which was one year and one month after the treaty date. The treaty date value of such delayed investment was $219,804.59.

Of the $190,434.68 payable to the Western Miami, only $31,739.11 was paid in 1854. The rest was payable in five annual installments of $31,739.11, without interest. The present value in 1854 of the installments was $137,411.30, plus the $31,739.11 actually paid in 1854, or a total of $169,150.41.

Annuity installments of $25,000 were also paid in 1854 and 1855. The 1854 payment had already been earned, however, and the 1854 value of the 1855 payment was only $23,708.50.

The total 1854 value received by the Miami for commutation of an annuity worth $530,800 was therefore $219,804.59, plus $169,150.41, plus $23,708.50, or a total of $412,663.50. This amount is approximately 78% of the annuity's value. The issue then is whether the payment to the Miami of only 78% of the value of their annuity constitutes unconscionable consideration or is inconsistent with the requirements of fair and honorable dealings.

The Government admits that the Miami were entitled to the annuity, and points to no factor which might have induced them to take less than the annuity was worth. The commutation was apparently done at the insistence of the United States. During the negotiations which took place in Washington, D.C., between George W. Manypenny, the Com-

missioner of Indian Affairs, and the Miami delegation, from May 23 to June 7, 1854, Commissioner Manypenny stated that the Government wanted to "blot out" the old annuities by making several large payments. One of the Miami delegates answered that his party did not want it that way, but wished the annuities to run on. We find no evidence that the Miami wanted the annuities commuted. Under such circumstances, we can think of no reason for their having taken less than the value of their annuities other than that they were less than completely aware of the meaning and methods of commutation, and were incapable of determining for themselves the value of the annuity. Under such circumstances, we think that payment of less than the true value of the annuities which the Miami were entitled to receive amounted to something less than fair and honorable dealings, and that the Miami are entitled to recover the difference between $530,800 (the value of their annuities) and $412,663.50 (the amount they actually received for the commutation of their annuities), which is $118,136.50.

It is conceded that the Indiana Miami are entitled to share with the Miami Tribe in this recovery, in the same proportions as their respective payments for the commutation as provided in the treaty. For the purpose of computing the proportion, we will use the figures as recited in the treaty, rather than the present values of the respective payments, since we think the recited figures are more likely to indicate the fractions into which the payment was intended to be split. The Indiana Miami are thus entitled to 54.8% of the recovery, which is $64,738.80, and the Miami Tribe are entitled to $53,397.70.

(4) CLAIM FOR INTEREST ON MISAPPROPRIATED FUNDS

A rider to the Appropriation Act of June 12, 1858, 11 Stat. 329, 332, provided that Miami annuities be paid to persons "of Miami blood" who had been excluded from annuities since 1846 and who were not included in the list of Miami compiled under the 1854 treaty. These persons were to be added to the list of Miami and be allotted 200 acres each in the Kansas reservation. Seventy-three persons were added to the Miami list under this Act, and they

were given lands and annuities. It was later found that these persons were not members of the tribe, nor entitled to share in its funds. In 1891 Congress determined that, under this Act, the United States had taken from the Miami Tribe without their consent the sum of $18,370.89 in October 1858, and lands worth $43,600.14 in November 1859, and it therefore appropriated these sums for the Miami Tribe, without interest. 26 Stat. 1000. The Miami Tribe here claim interest on these sums.

It is, of course, well established that interest against the United States cannot be recovered in the absence of express statutory or contractual provisions therefor, *United States* v. *Alcea Bank of Tillamooks*, 341 U.S. 48, *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588, except when there is a taking which entitled a claimant to just compensation under the Fifth Amendment. *United States* v. *Alcea Bank of Tillamooks*, 341 U.S. at 49; *Seaboard Air Line R. Co.* v. *United States*, 261 U.S. 299.

The Miami Tribe argue here that the misappropriation of funds was a taking, for which, under the Fifth Amendment, they were entitled to receive interest as well as the principal.

The allotment by the Government or its agents of property rightfully belonging to an Indian tribe to some other party is a taking of that property for which the Indians are entitled to receive just compensation, which includes the payment of interest. *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476. *United States* v. *Creek Nation*, 295 U.S. 103.

But the Government says there was no "permanent appropriation of property for public purposes," as there was in the *Shoshone* case. What happened in *Shoshone* was that the Government had brought a band of Northern Arapahoe to the reservation of the Shoshone under military escort in 1878. No cession or "permanent appropriation" was made to the Arapahoe at that time, yet the Supreme Court held that the Shoshone were entitled to receive just compensation for the value of their property which had been "taken" in 1878. There was no less a taking here when the Government gave to persons other than Miami Indians property which rightfully belonged to the Miami.

Any failure to fully set forth this claim for interest in its pleadings before the Commission was remedied by the clear statement of the claim by counsel for the Miami Tribe at the beginning of the trial.[1] The Commission's own Rule of Procedure 13(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by motion of any party at any time, even after judgment; but failure to so amend does not affect the trial of these issues.

The Miami Tribe is therefore entitled to recover interest at the rate of 5% on the $18,370.89 from 1858 to 1891, and on the $43,600.14 from 1859 to 1891. This amounts to $100,072.19.

(5) WHETHER THE INDIANA MIAMI ARE ENTITLED TO SHARE IN THE RECOVERY FOR THE KANSAS LAND

The Indiana Miami claim that they should have shared in the payment which was made for the Kansas lands in 1854, and in the recovery granted in this proceeding of additional compensation for those lands. They argue that because they had been given permission by the tribe and by the United States to remain in Indiana, they could not and did not lose their membership in the tribe, and that since they remained members of the tribe they were and their descendants are entitled to share in the proceeds of the tribal lands.

The Indian Claims Commission found that the Indiana Miami who had remained in or who returned to Indiana

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[1] "Now, there is still another claim that we have • • • and this again is solely a western Miami claim • • •

"In the year 1858 • • • the payment of annuities and the granting of land was authorized to certain people who were supposed to be Miamis and who, the evidence shows, were never Miami Indians at all. • • •

"[T]his was clearly a taking under the Constitution. It fulfills every requirement of a taking under the Fifth Amendment. • • •

"So the claim of interest from 1858 to 1891 • • •"

Mr. Miller (for defendant): "Could I ask a question there? • • • Is the only thing you are claiming there, which I have down as Issue 4 and which you are speaking of, the contention of interest on the amount that has been previously awarded from 1858?"

Mr. Rothschild (for petitioners): "That is correct, sir."

without tribal consent had separated themselves from the tribe, severed their tribal relationship, and lost all right to participate in the tribal assets, funds or property. This conclusion is correct. *Eastern Band of Cherokee Indians* v. *United States*, 117 U.S. 288, 309–312; *The Prairie Band of Potawatomi Indians* v. *United States*, Appeal No. 2–57, decided July 16, 1958, 143 Ct. Cl. —, 165 F. Supp. 139 (slip opinion, pp. 12 and 20).

The Commission further found that these Miami united with the Miami who had tribal permission to remain in Indiana, and that this united group, by participating in and approving the treaty of 1854, recognized and agreed to a division of the tribal assets in which they accepted certain money, benefits and consideration and waived their claims to other tribal assets, including the Kansas lands. The appellant Indiana Miami dispute this conclusion, on the grounds that the representatives of the Indiana Miami who participated in making the treaty were not authorized to cede the Kansas land. We think that there is evidence that the Indiana Miami acquiesced in the cession as made. Although their representatives present at the treaty negotiations, and at the signing on June 4, 1854, may not have been authorized to cede the land, after the treaty had been signed a full council of the Indiana Miami was called and a delegation dispatched to Washington, D.C., to secure an amendment to the treaty provision relating to the method of payment for the commutation of annuities, in which they were to share. The entire treaty, including the provision that the Indiana Miami were to have no share in the payments for the Kansas land, implying that they had no interest therein, was before the Indiana Miami council at that time, and they made no objection to the land cession or to the implication of their lack of any interest in those lands. We conclude therefore that the Commission was correct in its conclusion that the Indiana Miami are not entitled to share in the recovery for the Kansas lands.

CONCLUSION

The judgment of the Indian Claims Commission is reversed. The Miami Tribe of Oklahoma (petitioners in

Docket No. 251 before the Indian Claims Commission) are entitled to recover $195,723.70 as additional compensation for the Kansas land which was ceded to the United States in 1854, $53,397.70 as additional compensation for the annuities which were commuted by the treaty of 1854, and $100,072.19 as interest on the sums due them as a result of the misappropriations of 1858 and 1859. The total recovery will be $349,193.59. The Indiana Miami (petitioners in Docket No. 124–A before the Indian Claims Commission) are entitled to recover $64,738.80 as additional compensation for their share of the annuities which were commuted in 1854. These cases are therefore remanded to the Indian Claims Commission for the entry of an order in accordance with these conclusions.

It is so ordered.

LITTLETON, *Judge* (*Ret.*), and LARAMORE, *Judge*, concur.

WHITAKER, *Judge*, dissenting:

This case is brought under the Indian Claims Commission Act on the ground that various acts of the Government in its dealings with the Indians were unconscionable or inconsistent with fair and honorable dealings. We said in *Sioux Tribe of Indians, et al.* v. *The United States*, Appeal No. 4–55 Ct. Cl. decided November 7, 1956, that an unconscionable consideration "is that consideration which is so much less than the actual value of the property sold that the disparity shocks the conscience. *The Osage Nation of Indians* v. *United States*, 119 C. Cls. 592, cert. denied 342 U.S. 896 (1951)."

I do not think that the consideration paid the tribe under the 1854 treaty was so inadequate as to shock the conscience.

The Commission finds that the value of these lands was $1.25 an acre, but some of the Government's witnesses testified to a considerably lower value; one of them testified to 35 cents an acre, and another one to 50 cents an acre. Lands in that western country at the time of the 1854 treaty had a very uncertain value. It was difficult then, and it is much more difficult now, to determine with any degree of accuracy what those lands really were worth. The majority opinion says that what was paid the Indians was less than 50 percent of their value at $1.25 an acre, but what was paid

them was more than their value according to the testimony of both of the Government's appraisers. Under such circumstances, I cannot say that my conscience is shocked at the amount the Government paid.

I am more firmly of this opinion with reference to the commutation of annuities. A mistake may have been made in the commutation of these annuities, or there may have been no effort to compute them with accuracy, but the amount paid is by no means so out of line with the amount the court now finds their value to be, by meticulous computation, as to shock my conscience or to amount to conduct that was less than fair and honorable.

JONES, *Chief Judge*, joins me in the foregoing dissent.

APPENDIX B

Before the Indian Claims Commission

Docket No. 251

THE MIAMI TRIBE OF OKLAHOMA, ALSO KNOWN AS THE MIAMI TRIBE, ET ALS., PETITIONERS,

Docket No. 124–A

IRA SYLVESTER GODFROY, ET AL., ON RELATION OF THE MIAMI TRIBE, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Decided: July 14, 1958

Appearances: Edward P. Morse, Attorney for Petitioners in Docket No. 251; Walter H. Maloney, Attorney for Petitioners in Docket No. 124–A; W. Braxton Miller, with whom was associated Mr. Assistant Attorney General Perry W. Morton, Attorney for Defendant.

OPINION OF THE COMMISSION

WITT, *Chief Commissioner*, delivered the Opinion of the Commission.

Dockets Nos. 124–A and 251 were consolidated as each presents identical claims involving the Miami Indian reservation in Kansas and the commutation of tribal annuities under the treaty of June 5, 1854, 10 Stat. 1093.

The petitioners in Docket No. 251 are descendants of those Miami who moved to Kansas after the treaty of November 28, 1840, 7 Stat. 582, and who now reside in Oklahoma. They claim they are the only Miami whose ancestors acquired an interest in the Kansas reservation, and that the Miami Indians of Indiana were not entitled to participate in tribal assets after 1846 except as specified in the Treaty of June 5, 1854, 10 Stat. 1093, and except for certain individuals who were entitled to draw a proportionate share of the tribal annuities in Indiana under the treaties of November 6, 1838, 7 Stat. 569 and November 28, 1840, supra. The petitioners in Docket 124–A are those Miami whose ancestors remained in Indiana when the tribe migrated to Kansas in 1846, and include descendants of Miami Indians who went to Kansas and later returned to Indiana. They assert they are part of the Miami tribe and entitled to share in its assets.

Both petitioners claim that the Kansas reservation contained fewer acres than were promised the tribe and that they are entitled to recover for this shortage; and that the consideration paid for that portion of the reservation ceded in 1854 was unconscionable. It is claimed that the commutation of tribal annuities in 1854 was unfair, and that defendant should be charged with interest upon funds diverted from the tribal annuities and upon the value of certain Kansas reservation land wrongfully allotted to non-Miami persons.

The defendant does not controvert the right of either petitioner to institute these actions and does not participate in the membership dispute between petitioners. It is agreed that the Kansas reservation assigned the Miami tribe in 1840 contained 324,796.88 acres; that the tribe retained 70,638.54 acres in 1854 and ceded 254,158.34 acres to the United States.

The issues presented at this time may be said to be: (1) Did the Miami Indians residing in Indiana after 1846 have an interest in the Kansas land; (2) Was the consideration paid in commutation of annuities unconscionable; (3) May the petitioners recover interest on principal sums refunded to them on March 3, 1891, 26 Stat. 1000, on account of allotments and payments granted to spurious or unqualified Miami Indians; (4) Are petitioners entitled to recover because of a shortage of acres in the Kansas reservation, and, (5) Was the consideration paid for the acreage ceded to the United States in 1854 unconscionable?

Ownership of the Kansas Reservation

We shall first consider what, if any, interest the petitioners in Docket No. 124–A acquired in the Kansas land.

It is evident that the tribal unit with its inherent power and authority moved to Kansas in 1846, although its membership is not known. An additional 61 individuals migrated in 1848, leaving about 100 Miami Indians then in Indiana. Upon the tribe suffering a heavy numerical loss due to illness, many individuals returned to Indiana, and these, together with those who had remained in that state totaled 302 in 1854 as compared to 248 who then resided in Kansas.

According to the Miami treaties of 1838 and 1840 and the representations of the tribal delegation in Washington during 1854, only three families had tribal permission to remain in Indiana after the tribe moved to Kansas. These were the family of Chief John B. Richardville, whose health prohibited him from embarking upon the western journey, the family of Chief Francis Godfroy who was then deceased and

whose property could not be sold until his youngest child reached the age of 21 years, and Me-shing-go-me-sia and his brothers. Nor does it appear that this separation was intended to be permanent. It was a tribal custom to award land grants to members for meritorious services rendered to the tribe. These grants were ordinarily quickly converted into cash for wider distribution by the grantees, and both Richardville and Godfroy had received title to a number of acres in this manner. The treaty commissioner's reports and the treaty terms clearly imply the departure of the Richardville and Godfroy families awaited only the death of Richardville which occurred in 1841, the maturity of the Godfroy children and the sale of their respective lands. The 1840 treaty provided that the reservation set aside in 1838 for Ma-to-sin-ia's band should be patented in trust to his son, Me-shing-go-me-sia, and the treaty commissioner's report stated that some of the Ma-to-sin-ia band might remain upon this reservation, but that their eventual removal was to occur, we think, is a logical conclusion to be drawn from the fact that no provision was made for payment of tribal annuities to them in Indiana after the tribe moved to Kansas.

Since the 1840 treaty expressly committed the tribe to move from Indiana to Kansas, those members refusing to accompany it and who did not have the tribe's consent to remain in Indiana, and those who moved with the tribal unit to Kansas but later returned to the State of Indiana, separating themselves from the tribe, and having no further participation in the tribal consultations of transactions, must, we think, be held in accordance with previous decisions of this Commission, to have deliberately severed their tribal relationship and to have lost the accompanying right of participation in tribal assets. *Prairie Band*

of Potawatomi Indians vs. *United States*, Docket 15–J, et al., 4 I.C.C. 473. This group also included those 34 persons who Congress by Joint resolutions directed be paid a proportionat share of the Miami annuity funds, but who were not recognized by the tribe in Kansas or by the Miami Indians in Indiana as being Miami Indians and entitled to participate. The record indicates that all of the Miami Indians in Indiana subsequently united, and that they have conducted themselves, as a unit, and as independent of the tribal entity.

This separation of the Indiana Miami from the tribe and the termination of their interest in the tribal land in Kansas seems to have been recognized and acquiesced in by both the Miami in Indiana and the Miami in Kansas at the time of the negotiations in 1854 which terminated in the treaty of that year. The Miami tribe and those Miami Indians having tribal consent to live in Indiana had each complained that the tribal annuities were being paid to persons who were not entitled thereto. Five headmen of the Indiana group came to Washington in May, 1854, to discuss this matter with the Commissioner of Indian Affairs, and to meet with and discuss it with a delegation of the Kansas Miami or the "Western Miami" as they were called which was then in Washington and authorized to negotiate a cession of the Kansas land. Under the supervision of the Commissioner of Indian Affairs and these representatives of the Indiana group, a list of 302 persons as representative of all those of Miami blood residing in Indiana and entitled to participate in tribal annuities was prepared and attached to the treaty of June 5, 1854, when it was submitted to the Senate for ratification. Petitioners in Docket 124–A deny that they are bound by this treaty, asserting that

the Miami Indians in Indiana never approved, agreed to, or authorized the execution of it, although they accepted the attached list as correct and received their share of the commuted funds according to that list. We think they err in contending this treaty was not binding on them, for it was executed by an authorized representation of the Miami tribal unit and if petitioners in Docket 124–A were a part of that unit, as they allege, they were necessarily bound thereby.

It is quite clear, however, that the Indiana residents approved and participated in this treaty entirely as a separate and distinct unit apart from the Miami tribe. The preamble (Pet. Ex. 36, p. 175, Dkt. 251) to the 1854 treaty sets out as the negotiating parties the Commissioner of Indian Affairs representing the United States, and five duly authorized delegates representing the Miami tribe in Kansas. There are then listed five additonal persons who are described as "Miami Indians, residents of the State of Indiana, being present, and assenting, approving, agreeing to and confirming said articles of agreement and convention."

The first three articles provide for the cession of the Kansas land; reserve 70,640 acres of it, and specify its future dispositon; set out the consideration and manner of payment agreed upon and specifically provide that no part of the money payable under that article of the treaty or arising in event of the subsequent sale of any of the reserved land should ever be paid the Indiana Miami; limit the allotments provided for to Miami Indians "now residing on said lands". The 4th, 5th, and 6th articles deal with the commutation of annuities. As the treaty was worded when originally executed, Article 4 provided that if the Indiana Miami so desired, the

United States would retain their proportionate share of the principal fund resulting from such commutation, $231,004, and pay them an annual interest, and their representatives agreed to submit this proposition to their people for consideration, with their decision thereon to be immediately conveyed to the Commissioner.

The evidence of record discloses that the Indiana Miami thereafter met in open council and that the same five individuals who signed the treaty on their behalf were thereafter dispatched to Washington to represent the Indiana Miami in reference to the treaty which was then pending ratification. It was at the request of the delegation that Article 4 was amended to provide for the United States to retain said $231,004, at annual interest 25 years and to make disbursement of the accruing interest and eventually the principal to only those persons whose names appeared upon the corrected list of June, 1854, and their descendants, unless other persons were added to that list "by the consent of the said Miami Indians of Indiana, obtained in open council". The Senate also inserted a paragraph in Article 4 finding the delegation was a duly authorized deputation of the Miami Indians of Indiana and, as so amended, the treaty was ratified in August of 1854.

There is no direct evidence of the full powers which were granted to the second delegation from Indiana, but we believe it is quite unlikely it would have been given anything less than full authority to represent the Indiana Miami in all aspects of the pending treaty which was of vital importance to them.

The treaty clearly refutes their present claim of interest in the Kansas land, and we think the Indiana Miami are bound by it; that by assenting to and participating in it, they divided the tribal property with

the Kansas unit and that such action amounted to a recognition upon the part of the Indiana Miami that they possessed no interest in the Kansas land.

The defendant had no interest in the settlement of any claims of the two petitioner groups which were wholly against each other. It accounted according to the division agreed upon by them. There is no evidence of fraud, duress, undue influence or coercion upon the part of the defendant or any benefit to be derived by it from a division of the tribal assets between the petitioners; that petitioners did not understand the effect of the treaty provisions; or any good reason why the division of the property rights as provided by the 1854 treaty should be disregarded. It follows that the petitioners in Docket No. 124–A have no interest in any claim which is based upon a claimed interest in the Miami reservation in Kansas.

Commutation of Annuities

All parties are agreed that the annuities commuted in 1854 for the sum of $421,438.68 represented a $25,000 cash annuity established in the treaty of 1826, and other annuities of merchandise or labor having the following actual cost:

$320	salt per treaty of 1805, 1818
770	iron, steel, tobacco per treaty of 1826
200	agricultural aid per treaty of 1818
250	laborers per treaty of 1840
$1,540	

Defendant has not denied the validity of these obligations, but it claims that the 1826 treaty which limited the $25,000 annuity to "as long as they (the Miami) exist together as a tribe" makes it less than a perpetual annuity and consequently reduced its cash value in 1854.

The parties agree that the present value of an annuity is that sum necessary at current interest rates to annually produce the amount of the annuity. Petitioners say, however, that in arriving at the present value of these annuities as of 1854, six per cent per annum rather than five per cent per annum would, over some periods, more accurately reflect the varying rates of interest. Interest rates have been consistently applied at five per cent per annum prior to 1934 and at four per cent per annum thereafter when interest has been used as a measure of just compensation in these Indian suits against the Government, and we see no good reason for departing from these recognized rates which were fixed by the Court of Claims after an exhaustive examination into the history of interest rates. *Shoshone Indians* vs. *United States*, 85 Ct. Cls. 313, 380; *Alcea Band of Tillamooks* vs. *United States*, 115 Ct. Cls. 463, 518; *Yakima Tribe* vs. *United States*, 5 I.C.C. 630, 660. On this basis the present cash worth of a permanent annuity of $26,540 is $530,800.

It is true that Article 4, Treaty of 1854, recites that the $421,438.68 stipulated to be paid is in commutation of these annuities and in satisfaction of all claims or damages on account of non-fulfillment of any treaty terms or for injuries or damages to, or loss of property due to wrongful acts of citizens or agents of the United States. There is nothing disclosing what, if any, claims were presented or agreed to by the parties, and we must assume the $421,438.68 represents the consideration paid for the commutation. However, that is not all the Miami received, for by the next article it was stipulated the defendant should pay the $25,000 annuity in 1854 and in 1855. So, what the Miami actually received was $471,438.68 for a release of an obligation having the present cash value of $530,800, if the annuity of $25,000 is considered on a perpetuity.

We can not say that an annuity which is terminable upon a future contingency, however improbable that contingency may be, is permanent in its nature, and it follows that its value is something less than that of an annuity in perpetuity. We do not believe, however, that it is necessary to the final determination of this matter that we attempt to fix upon any definite figure as representing the 1854 value of this $25,000 annuity.

It is evident that none of the parties participating in the commutation negotiations contemplated the perpetual existence of the Miami tribe. More than half of the Miami Indians then living were no longer tribal members, and those who were members were taking allotments of the tribal land as quickly as it could be surveyed and their selections made, with all excess acreage in the 70,640 acres reserved for this purpose to be sold and the proceeds divided upon request of a majority of the tribe. Undoubtedly the individual members considered it more beneficial under these circumstances to receive their proportionate share of the agreed consideration (which would be some $850) during this time, than an annuity of approximately $48 per person indefinitely.

Whatever may have been the controlling inducement, there is no evidence of over-reaching, of fraud, duress, coercion, or misunderstanding. In satisfaction and release of a claim of indefinite value, the parties agreed upon a specific sum which was forthcoming at a time when the tribe was passing from a communal mode of living to that of individual allotments and was faced with the expense incident thereto. Under the circumstances disclosed, we can not say that the $471,438.68 consideration was unfair or dishonorable, or that it fell so far short of the true value of the annuities commuted as to be unconscion-

able. The petitioners may not recover upon their claims arising out of the commutation of annuities under the Miami treaty of 1854.

The Interest Claims

Petitioners have submitted Proposed Findings for an award of interest computed upon funds wrongfully diverted from annuities due the Miami Indians and paid under Act of June 12, 1858, 11 Stat. 329, 332 to non-Miami individuals, and upon the amount paid by defendant as compensation for certain allotments of reservation land made to such non-Miami persons under that Act. Under a proposed finding denying recovery on the ground that the allotments and disbursements were wrongfully made under apparent mistakes of law and fact but did not involve a taking or appropriation for public purposes under the Fifth Amendment, defendant cities as supporting evidence that the claim pleaded in Docket No. 251 is not based upon that amendment, and is not specifically pleaded at all in Docket No. 124–A.

We are unable to find any pleadings on the part of the petitioners in either Docket 251 or 124–A whereby claim is made for interest based upon an alleged taking or appropriation for public purposes under the Fifth Amendment. As a matter of fact, it is difficult to construe any of the allegations of liability on the part of the defendant which appear in either petition as alleging a claim based upon failure to pay interest, although Section 7 of the Commission's Rules of Procedure requires a clear presentation of all claims being asserted.

In their briefs petitioners do not refer to any language in their respective petitions as covering a claim for interest, nor do their requested findings refer to

any language in the petitions under which their right to interest is asserted.

In any event, even if the language in the petitions may be construed as making a claim for interest, the facts show only a misapplication of funds and an erroneous assignment of allotments. They do not, in our opinion, show a constitutionally appro d appropriation of property for public purposes. Restitution of the funds and payment of the determined value of the land at the time of its allotment are shown to have been made. Congress has never authorized the payment of interest in either instance, and the Commission is without authority to grant an award for interest resting upon such facts as are shown.

Alleged Shortage of the Kansas Reservation

The petitioners contend that the defendant promised them in 1840 as many acres in Kansas as the tribe ceded by the 1840 treaty or, in any event, 500,000 acres, and that the tribe was placed in possession of but 324,796.88 acres in Kansas. A cursory examination of the 1840 treaty discloses the Kansas land was not part of the recited remuneration for the 1840 cession; nor is it so presented by the petitioners in Docket 124 A in their companion case, Docket 124-F wherein they seek additional compensation for the Indiana land, and Mr. Rothchild, Attorney for the Petitioners in Docket 251, stated during final argument before this Commission on April 9, 1958 (Trans. p. 462):

> In other words, the consideration for the Big Reserve was money; the consideration for moving West was the Kansas land. This was earned when the tribe moved West, and it was earned by those who moved west.

So petitioners seek to recover the difference between the acreage allegedly promised in consideration of the tribe moving west, and the actual acreage assigned to it, computed at a sum per acre equal to the average per acre value of the Kansas land when it was ceded to the United States in 1854. Clearly this claimed shortage or taking was known before 1854 and could have occurred, if at all, only when the tract was assigned to and accepted by the Miami in 1841, at which time the tribe approved the amended treaty. It could represent only land contiguous to the 324,796.88 acres received by the tribe and lie on one or more of the north, south or western sides of that acreage. Passing, however, the fact that no evidence has been presented concerning the 1840 or 1841 value of any land in Kansas, and the difficulty of fixing a value on any tract so indefinite of location, we reach the problem of how much land the Miami were entitled to receive in Kansas.

The defendant first approached the Miami seeking to secure the tribe's removal from Indiana in 1833. It was not until 1838, however, when Chief Richardville expressed his concern that the tribe was surrounded by white settlements and that its removal was necessary if it was to remain extant, that the Miami evinced any interest in moving west. The tribe made no firm commitment but in the treaty of that year it agreed to send a delegation at the Government's expense to explore the western country, where the defendant promised "to possess, the Miami tribe of Indians of, and guaranty to them forever, a country west of the Mississippi river, to remove to and settle on, when the tribe may be disposed to emigrate * * * sufficient in extent and suited to their wants and condition, and * * * in a region contiguous to that in the occupation of the tribes * * * from the

States of Ohio and Indiana". The record does not indicate whether this delegation had explored the land here involved or any other western land before the tribe agreed in 1840 to move within five years to the country assigned to it in the west, or when it accepted the land selected for its future home by its approval in May, 1841, of the Senate Amendment to the 1840 treaty which amendment designated the particular tract here involved as the tribe's future home.

An agreement calling for a specific acreage of western land is not indicated by the evidence. A westward migration was not considered at all in 1833 or 1834 and the fact that the 1838 and 1840 treaties each fail to describe the western land as a 500,000 acre tract or as equivalent in area to the acreage being ceded in Indiana, instead of the much more lengthy and more general description of the country promised to the tribe which the 1838 treaty specified should be within a certain region and suitable in area for certain purposes, is strongly indicative that there was no agreement that the western tract should contain any specific acreage. When the Senate, by inserting Article 12 in the 1840 treaty, tendered the tribe a specifically described tract, which tract met with these specifications and the Miami tribe accepted that tract by approving the amended treaty after the effect of such action upon their part had been explained to them, the tribe must be said to have accepted the described tract. That it ceded some 254,000 acres of such tract in 1854 and thereafter continued to reside upon 70,638.54 acres of it is an effective argument that the Kansas land was "sufficient in extent, and suited to their wants and conditions." That the tract was within the region designated is not disputed. That the United States did not guarantee it to contain a definite acreage is established by the use of

the word "estimated" in Article 12, and that the Miami tribe understood this is evidenced, we think, by the fact that no complaint was made of the size of the tract when the tribe went into possession and none was presented until negotiations were pending for the sale of a part of the land in 1854.

From the several reasons stated we think the Government promised the Miami tribe an indefinite location in the west; that in 1846 it offered the tribe a particular tract and the tribe accepted that tract as meeting its specifications for a country within the region occupied by other Indian tribes from Indiana and Ohio, and sufficient in size for its wants. It is evident that the Kansas reservation met these requirements.

There appears to be no basis here for a recovery on the grounds of unfair and dishonorable dealings. The movement of the Miami into Kansas was beneficial to the United States who desired to free Indiana from the presence of the tribe, but it was also essential to the welfare of the tribe that it move from its location within a ring of white settlements. By purchasing the tribal land within this unsatisfactory area and by placing the tribe in possession of a tract within a region preferred by it and containing 254,000 acres more land than sufficient for its wants (as evidenced by the subsequent cession), we think defendant fulfilled every requirement of fair and honorable dealings.

1854 Value of the Kansas Land

The Miami tribe contends that the land ceded on June 5, 1854, had a reasonable value of $2.40 per acre ($609,989.00) and that it received an actual consideration of $121,974.23. Defendant values the land on June 5, 1854, at from 35¢ per acre ($89,035.42) to 50¢ per acre ($127,079.17), and claims a consideration

paid of $200,000. This variation in the amount of consideration claimed to have been paid results from the defendant using the consideration recited in the treaty, whereas petitioner tribe has treated the installment payments as an annuity which it has commuted back to the treaty date. The propriety of its action in so doing becomes material when determining whether the consideration paid was unconscionable.

In *Miami Tribe* vs. *United States*, Docket 67, the United States was permitted to offset against an award based upon the Miami treaty of 1818 only the sum of the commuted value of certain annuities forming a part of the treaty consideration instead of the total sum it had paid out to meet the annuity obligations. However, we do not find that situation analogous to the one before us. There the annuity promises were the consideration for the cession, and it was necessary to determine the value of those promises as of the date they were made. Here the consideration is clearly stated: $200,000. Whatever arrangement was agreed upon concerning the method of its payment, that sum was the consideration passing between the parties, and upon its payment the obligation was satisfied according to the treaty terms. The fact that the greater portion was paid in installments did not convert the installment payments into an annuity, and to so treat them would in effect constitute an interest charge when the treaty is silent in that respect. *The Croe Tribe* vs. *United States*, 6 I.C.C. 98. Receipt of payments totaling $200,000 is not denied, and we turn to a consideration of whether that sum approximately represents the fair and reasonable value of the Miami land.

This value is to be determined as of June 5, 1854, the treaty date, for it is a principle of international law which has been applied to treaties or agreements

between Indians and the United States, where individual rights are not involved, that when the instrument is silent as to the time it shall become operative the rights of the parties relate back to the date of signing and not to the date of ratification, unless the instrument provides otherwise in which event the stated terms control. *Coeur d'Alene Tribe* vs. *United States, Dkt.* 81, I.C.C. 38, 46.

The parties hereto each rely upon information contained within the original survey notes of 1856–57 as a basis for the classification of the Miami tract. Those notes disclose the reservation was classified at that date as 13.3% Class I land, 65.7% Class II and 21% Class III. Class I was bottom, terrace, and upland, having 2% or less slope, with alluvial and dark residual prairie soil. Class II encompassed the present-day Soil Classifications of the United States Governmental Departments of Classes V, VI, and VII, having slopes up to 12%, and dark residual prairie soil over a clay subsoil. These four soil types are all good agricultural lands and under the climatic conditions prevalent in eastern Kansas are well suited to the growing of small grains. Class III is land unsuited for agriculture, but produces a good prairie hay. There was a 40% overall timber coverage of walnut, hickory, elm, sugar maple and other hardwoods on the uplands with sycamore along the streams. Within the tract, exclusive of the 70,638-acre reserved area, this coverage dropped to 15%. The land is drained by the Osage River and its tributaries, which generally flow south and southeast through the tract. There is some flood history along the Osage within a limited distance of the stream. Limestone outcroppings are found in the southeast quarter of the reservation. Iron ore, coal and tar springs (indicating the possible presence of petro-

leum) were noted by the surveyors as present throughout the entire tract but there is no evidence that either contributed to the land values.

Timber and limestone were considered attractive as materials for the construction of crude homes and fences but in 1854 possessed no value apart from the land. The highest and best use of this land was for small-farm agriculture, and a timber site with adjacent prairie was considered preferable.

Clearly the present instance is one where our valuation can not rest upon market value alone for the size of the tract and its location in the unsurveyed Indian country, limited any immediate purchaser to the United States Government. In the absence of an ordinary market value, we must turn to a consideration of other factors which demonstrate a present or potential value and thereby establish a basis of evaluation. Our findings of fact are therefore somewhat voluminous. They are designed to cover all factors influencing value, such as soil, climate, classification of land, natural resources and economic or potential value; water, rail, and wagon transportation systems; population; economic conditions and potential agricultural use. We have also given careful consideration to the testimony of the expert witnesses which were called by both parties hereto.

On behalf of the petitioner Ida Fox testified concerning historical documents and events prior to 1857 and Professor John Long testified concerning information found in the notes of the original survey run of the Miami reservation and of the Peoria trust lands, a 208,585.69-acre tract adjoining the original Miami reservation on the north. Neither witness placed a monetary value on the Miami land but petitioners rely primarily upon Mr. Long's testimony of comparability between the Miami and Peoria land and

the sales history of the Peoria land to establish a value for the Miami tract under the conditions prevailing as testified to by Miss Fox. Defendant's witnesses, Richard B. Hall and Dr. William Gordon Murray, had also studied the notes of the original survey run of the Miami tract as well as those covering the survey of a 350,000-acre tract in Missouri adjacent to the Miami land, and taking into consideration the rate of transfer of the Missouri land, comparability of the tracts, state of development, economic conditions and other factors, Dr. Murray valued the Miami land ceded in 1854 at 50¢ per acre as of 1854. Mr. Hall's valuation of 35¢ per acre was based upon the fact that similar and contiguous land in Missouri had been on the market for years at $1.25 per acre; that a hypothetical purchaser would have considered himself entitled to 25% profit because of time involved in realizing upon his investment; would need consider 25% of the land must be given away to finance transportation facilities and internal improvements, that 25% would go to advertising, sales promotion and carrying expense; and 25% would remain to care for the original purchase. He did not estimate the time necessary to complete the disposal program. Factors contributing to his net valuation included the Graduation and Military Bounty Acts, neither of which was in existence on June 5, 1854. However, since legislation similar to the Graduation Act had long been pending, a prospective purchaser would have been aware of the probability of this or similar legislation being enacted. The Military Bounty Act of 1855 increased the supply and made military warrants assignable but both warrants and script had been in existence since 1820. The value of opinion evidence, as we said in *Miami Tribe* vs. *United States* (4 I.C.C. 436), depends upon the qualifications of the witness, the correctness

of the facts upon which opinion evidence is based and whether all relevant factors have been taken into account.

Evidence concerning the so-called Peoria trust land (that land ceded by the Kaskaskia, Peoria, Piankeshaw and Wea tribes in 1854 for sale by the United States on behalf of the Indians) is that it was 208,585.69 acres in size, adjoined the Miami reservation on the north, was very comparable to the Miami tract in climate, soil, topography, timber coverage, best potential use, want of mineral values and lack of improvements. It lay between the Miami tract and the town of Kansas City and was hence nearer to Kansas City and to Leavenworth than the Miami land; the Fort Leavenworth-Fort Scott Trail also crossed its eastern edge and the Santa Fe Trail ran within a few miles of its northwest corner. It was surveyed in 1856 and appraised at an average $1.66 per acre. All but 700 acres sold in small tracts at public sale within a period of less than a month in 1857 for an average $1.67 per acre. The tracts not claimed by pre-emptors at $1.25 per acre brought generally $3.00 per acre.

Petitioners also point out that in 1857 pre-emption claims in the Miami reservation were reputedly bringing $5.00 to $7.00 per acre near Sugar Mound within the Sugar Creek valley, and that claims within the Osage River valley brought $1.25 to $3.12 for prairie land and $1.87 to $6.25 per acre for timber land; that Iowa trust land, along the Kansas-Nebraska state line, sold for an average of $2.35 per acre in June, 1857; Delaware trust land within 50 miles of the Miami tract, including much land in the valleys of the Kansas and Missouri rivers, sold for an average $2.00 per acre in 1867 when pre-emption purchasers and combines of speculators were reported to have acquired the land for less than the

free market value. A 2,571-acre tract of well-timbered land, within an area where timber was scarce, sold to the Christian Indians in 1854 for $2.50 per acre. There is no comparability as to size between either of the small-tract sales or the Christian Indian tract and the 254,158.34 acres under consideration. There is no soil, topography or stream data concerning any of these lands for comparison use, but the Christian Indian tract lay within two miles of Leavenworth, the most rapidly developing community in Kansas where agricultural produce had a market. The chief commercial road to the west bisected the tract, and it could be expected that rail transportation would soon follow it westward, whereas the Miami tract was 45 miles from the closest settlement in Kansas, was serviced by a dirt road over which transportation was difficult, and there was no apparent reason to expect railroad service within its vicinity in the near future.

The relative size of the tracts and the sale dates require consideration when these respective sales are compared with the Miami tract. It is the 1854 value of the entire Miami tract that we must ascertain and not the total of the values of the innumerable smaller units into which it may be divided. A 160-acre tract, as the trust lands were offered for sale, is usually purchased for a home, but a 254,000-acre purchase becomes a speculation, with the purchaser confronted with the expense of financing, surveying, advertising, carrying expenses, the sure knowledge that the land will be picked over and culled by the first of his purchasers, and that an indefinite time will pass before he will realize a return or profit from his investment, whereas a quicker and more certain return and profit could be derived from negotiable paper or other investments.

Petitioners also point out that in 1891 the Court of Claims, upon a question submitted to it by a Congressional Committee, certified to that Committee its finding that 14,533.38 acres within the 70,638.54 acres reserved in 1854 by the Miami Indians had an average value in November, 1859, of $3.00 per acre.

The unexpectedly rapid settlement of eastern Kansas, its early attainment of statehood, and its corresponding economic development, its increase in population and the roads, markets and railroad facilities developed during the next decade, are all elements of hindsight which were not available to a prospective purchaser of the Miami land in 1854, yet each contributed to a much higher market for the Kansas land in 1859 than existed in 1854.

Taking into consideration the fact that 85% of the Miami land sold to the defendant was without timber, that a vast amount of public land was available in the United States and particularly within the adjoining State of Missouri, and the vast acreages in Kansas which had been ceded to the United States outright or in trust by the Delaware, Shawnee, Iowa, Sac and Fox, Kickapoo, and the United Tribes of Kaskaskia, Peoria, Piankeshaw and Wea, immediately prior to the Miami purchase, which land a prospective purchaser could expect would appear on the market in small units within the immediate future, and such other elements bearing upon value as appear from the entire record, with due consideration being given the reasonings and conclusions of the expert witnesses, it is our conclusion that on June 5, 1854, the 254,158.34 acres of Kansas land ceded by the Miami Tribe to the defendant were reasonably worth $1.25 per acre or $317,697.93.

The question next arises: Does the payment of $200,000 or .7867¢ per acre for land worth $1.25 per

acre or $317,697.93, being about 63% of its value, constitute an unconscionable consideration?

Webster's New Collegiate Dictionary defines "unconscionable" as: "1. Not conscionable; unreasonable; as, an unconscionable charge. 2. Not guided or controlled by conscience; unscrupulous; as, an unconscionable rascal." Webster's International Unabridged Dictionary also likens it to "outrageous", "egregious", and "exhorbitant". Black's Law Dictionary defines an unconscionable bargain as "A contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other", and cites the case of *Hume* vs. *United States*, 132 U.S. 406, 10 Sup. Ct. 134, 33 L. ed 393.

It appears that there is no hard and fast rule for determination of what is or is not an unconscionable consideration. The sole criterion is whether or not the consideration is so out of line with the true value of the property as to "shock the conscience". The Supreme Court said in *Klamath and Modoc Tribes* vs. *United States*, 286 U.S. 244, when considering whether a release was invalid which was granted for less than four per cent of the value of the land involved:

> Even if judicially cognizable, as would be a like contention in ordinary litigation between individuals, plaintiff's insistence that inadequacy of consideration invalidates the release could not have been sustained. That is so because the findings fail to show that any person acting for the United States deceived or misled plaintiffs as to the value of the land or, indeed, had knowledge of any fact bearing upon its value that was not well known by plaintiffs when they made the settlement and gave the release. Mere inadequacy of consideration is not enough. * * *

Payment of less than half the true value appears to be unconscionable. 3 Pomeroy's Equity Juris., (5th ed., 1941), p. 637; *Butler* v. *Miller*, 1 Ir. Eq. 195, 211, 15 W.R. 779; *Mussleman* v. *Knott*, 7 Ky. L. Rep. 380. Yet the courts have fixed no exact division line and what one person may think unconscionable, another may well consider otherwise. The present record does not indicate that petitioners were deceived or misled by defendant as to the value of the land, or that any fact bearing upon its value was withheld from them, that the delegation did not fully understand the effect of its action, or was lacking in freedom of action. Nor is there proof that the tribe was so destitute and suffering such financial embarrassment as to place it at the mercy of defendant during the treaty negotiations. Under the circumstances we do not think an unconscionable consideration has been established within the meaning of the Indian Claims Commission Act. (*Osage Tribe* v. *U.S.*, 119 C. Cls. 592; *Otoe and Missouria* v. *U.S.*, 131 U.S. 393.)

Petitioners have plead alternatively under Section 2 (5) of the Act. In order for the transaction to be unfair and dishonorable and entitle petitioners to relief under this section, some mistreatment must exist other than mere inadequacy of price. When relief, if granted, must be based upon inadequacy of consideration alone, such inadequacy must be such as may be characterized "unconscionable". The Commission is of the opinion that the facts and circumstances shown here disclose no ground for relief other than an inadequacy of consideration which in itself alone falls short of the requirements of our Act for

the granting of relief. Wherefore petitioners' prayer in this respect must be denied.

(S) EDGAR E. WITT,
Chief Commissioner.
(S) LOUIS J. O'MARR,
Associate Commissioner.
(S) WM. M. HOLT,
Associate Commissioner.

APPENDIX C

Article 4 of the Treaty of June 5, 1854 (10 Stat. 1095–1096):

> 'It is agreed that the remaining instalments of the limited annuity of twelve thousand five hundred dollars, stipulated to be paid by the second article of the treaty of November twenty-eighth, one thousand eight hundred and forty, shall be divided and paid to the said Indians thereafter as follows: to the Indiana Miamis, six thousand eight hundred and sixty-three dollars and sixty-four cents, and to the Western Miamis; five thousand six hundred and thirty-six dollars and thirty-six cents, per annum; subject, however, to the deductions provided for in the sixth article of this instrument; and that the permanent annuity stipulated in the fifth article of the treaty of October sixth, one thousand eight hundred and eighteen, as modified by the fifth article of the treaty of October twenty-third, one thousand eight hundred and thirty-four, for a blacksmith and miller, shall be continued for the benefit of said Western Miamis; but the said Miami Indians hereby relinquish and forever absolve the United States from the payment of the permanent annuity of twenty-five thousand dollars, stipulated in the fourth article of the treaty of October twenty-third, one thousand eight hundred and twenty-six, of the permanent provisions for money in lieu of laborers, for agricultural assistance, for tobacco, iron, steel, and salt, and from the payment of any and all other annuities of every kind or description, if any there be, to which said Indians may now be entitled by virtue of the stipulations of any former treaty or treaties; and they also release and discharge the United States from all claims or damages on

account of the non-fulfilment of the stipulations of any former treaties, or of injuries to, or destruction or loss of property by, the wrongful acts of citizens or agents of the United States or otherwise; and in consideration of the relinquishments and releases aforesaid, the United States agree to pay to the said Miami Indians, the sum of four hundred and twenty-one thousand four hundred and thirty-eight dollars and sixty-eight cents, in manner as follows, viz: one hundred and ninety thousand four hundred and thirty-four dollars and sixty-eight cents, to the Miami Indians residing on the ceded land; and two hundred and thirty-one thousand and four dollars, to the Miami Indians in the State of Indiana; to be paid under the direction of the President, and in such manner and for such objects as he may prescribe, in six equal annual instalments, the first of which shall be paid in the month of October, one thousand eight hundred and fifty-four. And in full payment and satisfaction of a balance of eight thousand dollars and sixty-eight cents, heretofore appropriated by Congress to pay for the valuation of certain improvements, or to make others in lieu of them, but which, not having been expended, has gone to the surplus fund; and of the accumulation of the appropriations for the support of the poor and infirm, and the education of the youth of the tribe, as provided by the treaties of October twenty-third, one thousand eight hundred and twenty-six, and November sixth, one thousand eight hundred and thirty-eight, amounting to fourteen thousand two hundred and twenty-three dollars and fifty cents; and of the claims of the Miamis who live on the ceded land, for damages and loss of stock and other property, caused by their removal west, and their subsequent loss by removal from Sugar Creek—it is agreed that the United States will pay to the Miami Indians residing on said ceded lands, the sum of thirty thousand

dollars, to be paid as follows, viz: fourteen thousand two hundred and twenty-three dollars and fifty cents, in three equal annual instalments, the first which shall be paid in the month of October, one thousand eight hundred and fifty-four; and the sums of eight thousand dollars and sixty-eight cents, in lieu of the improvement money referred to, and seven thousand seven hundred and seventy-five dollars and eighty-two cents, being the residue of said amount of thirty thousand dollars, shall be paid immediately after the requisite appropriation shall have been made: *Provided,* That the said sum of eight thousand dollars and sixty-eight cents, shall be paid to the persons who are entitled to the same, as far as they may be practicable; and the seven thousand seven hundred and seventy-five dollars and eight-two cents shall be paid to such of the Miamis west as have lost stock or other property by wrongful acts of citizens of the United States, while in the Indian country, and to those who were injured by the loss of improvements in their removal from Sugar Creek to their present home. The claimants, in all cases, to file their demands with the chiefs within six months after the ratification of this instrument; and if the aggregate sum of the lawful claims exceeds the amount of the fund, the claims shall be reduced by a uniform rule, so that each claimant shall receive his pro rata; but if it fall within the amount of said fund, the excess shall be paid to the tribe as annuities are paid. Any person aggrieved by the decision of the chiefs may appeal to the agent: *Provided, however,* That if the Miami Indians of the State of Indiana desire it, and notify the Secretary of the Interior of that fact, he will cause the said sum of two hundred and thirty-one thousand and four dollars to be invested for them in safe stocks, and pay over annually to said Indians the interest arising

from such investment, and the said Miami Indians now present from the State of Indiana, agree to take the opinion of their people on their return home, and advise the department without delay.*

*See amendments, *post*, p. 1098, 1099.

seems irrefutable that, in the light of the testimony of defendants' witnesses, who stand unimpeached, and the general situation shown by the evidence, just compensation has not been awarded the owners for what is being taken away from them in this action, and that if the judgment under review is permitted to stand, the owners-defendants thereby, and by the rulings and findings adverse to them, have been denied Due Process of Law, the Equal Protection of their Laws, and, since Magna Charta (Runnymede, 1215), their property and the possession, use and enjoyment thereof wrested from them, in violation of the Law of the Land;—and an "American's house is no longer his castle," and his temple is gone.

It is respectfully submitted that, in each of the points raised in the Questions Involved the Court erred, to the manifest injury of the defendants-appellants and in contravention of their fundamental legal and constitutional rights aforesaid.

The general situation in eminent domain differs from that which is ordinarily involved as between parties. Here the Crown is wresting from the citizen his castle. For centuries the law by which we are governed has been administered in protection of the citizen from the arrogance of the Crown, a tyranny which is fostered inevitably by being "Clothed with a little brief authority," unless kept in reasonable restraint, and this restraint of the Crown is our Country's proud claim through its Constitution. Here the defendants had lived and labored from birth. Emotion is bound to enter in and become a force that should be considered. Our forefathers fought, bled, sacrificed their private fortunes, and died, so that those sacred rights should be preserved against the ruthless invasion of the Monarch.

This is the picture which eminent domain presents. But the representatives of the State often disregard it and base their assertions upon legal technicalities and sophistry; and the jury, unlearned in this philosophy, wonders, perhaps, what it all means and seeks its own channel, in utter disregard of the evidence produced before it.

Such is the picture here.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari be granted.

JOHN A. HARTPENCE
Attorney for Petitioners.

JOHN WATTAWA
Of Counsel.

APPENDIX

*A-779-59

Opinion of the Appellate Division

HOUSING AUTHORITY OF THE CITY OF TRENTON, *Plaintiff-Respondent,*

vs.

MAURICE A. FINKLE, et als., *Defendants-Appellants.*

Argued March 22, 1960—Decided July 5, 1960

Before Judges Price, Gaulkin and Foley.

MR. JOHN A. HARTPENCE argued the cause for the defendant-appellants.

MR. ARTHUR S. KELSEY argued the cause for the plaintiff-respondent (MESSRS. MARK D. KAPLAN and JULES J. KELSEY, attorneys).

The opinion of the court was delivered by GAULKIN, J. A. D.

This is a condemnation case. The condemnation commissioners awarded to the defendant property owners $12,800 for 616 Perry Street and $30,300 for 618, or a total of $43,100. Plaintiff appealed from these awards, and the defendants cross-appealed. The appeals were consolidated for trial and the parties agreed that the jury bring in a single verdict for both parcels. The verdict was $26,000, and the defendants appeal.

The first contention is that the trial court erred in refusing to grant defendants' motion to set aside the verdict of the jury and grant a new trial on the ground that the verdict was against the weight of the evidence.

*A-779-58

**Perry

Opinion

The Authority's only witness was a Mr. Bradley. He placed a value of $22,400 on the two parcels, and said he

based that opinion upon the prices paid in what he considered to be comparable sales, and upon the estimated net income that could be derived from the property. He said ". . . on the rentals now being paid and being paid over a period of years for this type of property in that block, an investor-purchaser should be able to derive a net return of between 8 and 9% after paying all operating costs . . ." or ". . . something around $2,000, $2,200." He figured 616 alone worth $7,000 and 618 alone $11,650, or a total of $18,650 but as a unit he was of the opinion the total market value would be approximately 20% greater, or $22,400. However, Bradley was not asked and did not testify how much he estimated the rental value to be, nor did he state the total amount of the ". . . taxes, insurance, water rent, maintenance, management charges, . . ." which would have to be deducted from the rental income to leave a net of "$2,000, $2200."

The premises were, in fact, not rented, because the defendants operated a store which occupied all of the ground floor of both buildings, an archway having been cut through the intervening walls. 616 was frame, 618 brick. Defendants admitted that the upper floors of 616 had been untenanted since May 1958. The upper floors of 618 were occupied for dwelling purposes by the defendants, or some of them.

The defendants produced two real estate experts, Mr. McCarthy and Mr. Bachman. Mr. McCarthy testified that the upper floors of 616 ". . . could not be lived into [sic] under the present conditions"; the store ". . . would bring probably $175 a month, the joint stores"; the upper floors of 618, $225 per month. This made a gross rental of $400 per month or $4800 per year, which he estimated would yield a net income of approximately $3,400 a year. In effect, therefore, he estimated the costs to be deducted from the $4,800 gross rental per year would total $1,400 per year. McCarthy placed a value of $68,578 upon the com-

bined properties, and when asked on cross examination whether he had stated on direct that ". . . in its present condition and for that sum of money . . .' a purchaser would be willing to buy when the return was only 5%, he answered "I said 5 or 6% return." He admitted that ordinarily an investor in real estate expects "anywheres from 8 to 12%."

Mr. Bachman agreed that the upper floors of 616 were not tenantable, but in nearly all other important respects he disagreed with Mr. McCarthy. He testified that the rental value of the upper floors of 618 was $150 per month, while that of the store was $5,200 per year or about $440 per month. He agreed that "[r]eal estate investments usually have to produce 9 or 10 [per cent] to be attractive." He testified that in his opinion the value of the property was $55,200, and that this ". . . should return about a 9 point return . . . I believe the net income would be around $5100." Since his estimate of the gross annual rental totaled $7,000 per annum, his cost estimate was necessarily $1,900 to produce a net income of $5,100.

The jury, therefore, had the right to accept the following annual figures, since they were presented by defendants own experts:

Store rental at $175 per month (McCarthy)	$2,100.00
618 upstairs rental at $150 per month (Bachman)	1,800.00
616 upstairs (McCarthy and Bachman)	0.00
Total Annual Rental	$3,900.00

If there be deducted from this gross annual rental Mr. Bachman's estimated $1,900 as the annual cost of operation, the net income would be $2,000 per annum. If there be used Mr. McCarthy's figure of $1,400, the net would be $2,500 per annum. Either capitalized at the 9 to 10% yield

agreed upon by Mr. Bachman as fair, justified the $26,000 verdict on an income basis. In any event, either net income figure is not so far from Mr. Bradley's estimate of $2000 to $2,200 as would justify us in holding that the trial court erred in refusing to set aside the verdict.

Defendants contend also that the verdict is against the weight of the evidence because the sales used by Mr. Bradley were not truly comparable, whereas those used by Mr. Bachman were, and, therefore, the jury should have accepted Mr. Bachman's testimony and rejected Mr. Bradley's. However, once admitted, it was for the jury to determine which testimony it would accept. We perceive no error in the trial court's admission of the testimony, and it is settled beyond extended discussion that we may not upset the verdict of the jury merely because we would have decided otherwise had we been the triers of fact.

We have examined the other arguments of defendants relating to the weight of the evidence, and find no error in the trial court's denial of a new trial on that ground.

Defendants contend that the trial court committed prejudicial error in refusing to permit their witnesses McCarthy and Di Nola ". . . to testify separately with regard to building value and land value especially in view of having permitted like testimony from plaintiff's only witness."

In support of this contention defendants say first that plaintiff's witness Bradley valued the buildings and the land separately and therefore McCarthy should have been permitted to do the same. However, as we read Bradley's testimony, he did not value the land and the buildings separately.

Defendants now say they wanted McCarthy to give his separate valuation of the land and the building "to show the bases upon which he reached that opinion" that the properties were worth $68,578. However, defendants did not advance this ground for the admission of the testimony

to the court below and never made it clear to the court below, by offer of proof or otherwise, that they sought to prove by Mr. McCarthy anything other than reproduction cost less depreciation. For example, when the trial court asked, as it did several times, for an offer of proof, the reply was:

"Mr. Hartpence: The purpose in calling him is that he has examined the buildings and he has formed a conclusion as to the value of the buildings as of the time of the taking, and that is what we have a right to show, surely, in contradiction or in whatever it may result in to the testimony that is already in as to what the realtor has the value of these buildings in reaching his conclusion.

The Court: Well, now you say value of the buildings. I am asking you, replacement cost or what?

Mr. Hartpence: Well, I will have to leave it to Mr. McCarthy and Mr. Di Nola to show what their theory of it is. My object is to show what their judgment or opinion is as to the value of those buildings as they stood. Now, how they will reach their conclusion, I will have to leave it to them to work out their theory."

After considerable discussion, counsel continued:

"Mr. Hartpence: I don't offer him as a realtor expert at all. He is not being brought in as a realtor at all. He is brought in as a man who is a builder, a constructor of buildings, who knows what it costs to build a building, and he knows what a building is worth that has been used for years and just what the value of that building is as it stands there.

Now, how he reaches his conclusion may be a different matter. I will have to leave that to the expert; but surely in view of the fact that Mr. Bradley, the one witness for the Housing Authority, has based his value

of these properties upon the value of the building on each tract, I have a right to show that he is entirely erroneous in his concept of the value and he is not even a builder or a construction engineer. He is a realtor."

After many more pages of colloquy, the court adjourned for the day. The following morning the court said:

"The Court: Now, gentlemen, we had considerable discussion yesterday, and I think the subject has been pretty well covered and I still don't know the purpose of the last witness . . ."

Counsel then said that defendants' purpose was to prove reproduction cost less depreciation and obsolescence. The court thereupon ruled that because of the age of the buildings, and their nature, condition and use, he would not permit such testimony.

Defendants contend that this also was error, arguing that the property in question was "unique in the entire area," and under such circumstances testimony of reproduction cost less depreciation should have been received. They do not cite *State* v. *Burnett*, 24 N.J. 280 (1957) in their brief, but since they did mention the case below, and since it is the strongest authority for defendants' position, we shall assume that defendants rely on it and the authorities therein cited. Suffice it to say that the *Burnett* case did not lay down an absolute rule but still left it to the sound discretion of the trial court whether to receive such evidence. In the case at bar we can not say that the court "abused" that discretion. To begin with, no owner or buyer would reconstruct these buildings—even the Finkles themselves. The buildings here had not (as in *Burnett* and in *Bartindale* v. *Aetna Ins. Co.*, 7 N. J. Misc. 399 (Sup. Ct. 1929); same case after retrial, 9 N.J. Misc. 535 (Sup. Ct. 1931) been designed by an owner who wanted them that way and would rebuild them. Here the buildings were not originally designed for the commercial purposes to which they had been adapted,

and if they were destroyed it is inconceivable that they would be rebuilt as they are now. In addition, the buildings are old, obsolete, and 616, at least, is in great disrepair. We are not convinced that these buildings were so unusual as to make it necessary to permit evidence of reproduction cost less depreciation.

Furthermore, when Mr. McCarthy did ultimately testify as a real estate expert, he stated that he arrived at his figure of $68,578 on the basis of "the cost of the building less depreciation" plus land value.

In short we find no prejudicial error in the exclusion of the evidence.

Defendants challenge also the trial court's rulings on other offers of proof, namely (a) excluding testimony by defendants' witness, Mr. Bachman, respecting certain "comparable" properties (b) refusing to permit Maurice A. Finkle to testify as to the amounts spent for maintenance (c) refusing to permit Maurice A. Finkle to testify whether or not agreement had been reached with plaintiff regarding compensation, and (d) refusing to allow one of the owners to testify as to the cost of moving.

The properties which the trial court refused to accept as "comparable" were from 8 blocks to a mile away from the premises in question. Defendants have not demonstrated to us that any of the rulings above listed was prejudicial error.

The defendants also urge as plain error the court's charge to the jury as to the use they were entitled to make of their own view of the premises. We perceive no "plain error" in this charge.

Finally, defendants argue that the court erred "[i]n limiting the finding of the award by the jury to the price as between a willing buyer and a willing seller as of September 29, 1958," and ". . . in ruling September 29, 1958, as the effective date for the fixing of value of the subject properties, in refusing to charge defendants' request No. 2, and in

excluding evidence tending to show the damaging effect of delay."

September 29, 1958 was the date of the filing of the complaint for condemnation. R. S. 20:1-9 provides for the "... assessment of the amount to be paid ... for the land or other property and damages as aforesaid, as of the date of the commencement of the action ...," and generally "the proper measure of compensation is ... said to be the fair market value at the time of the institution of ... condemnation proceedings." *State* v. *Jones*, 27 N.J. 257 (1958); *Wilson* v. *City of Long Branch*, 27 N. J. 360, 373-375 (1958); *N. J. Highway Authority* v. *Wood*, 39 N. J. Super. 575 (App. Div. 1956); *Danforth* v. *United States*, 308 U. S. 271, 285, 60 S. Ct. 231, 236, 84 L. ed. 240, 246 (1939). There is nothing in the testimony in this case that warrants the application of a different rule, nor that would justify charging defendants' request No. 2 or the admission of what defendants call "evidence tending to show the damaging effect of delay."

The judgment is affirmed. No costs.

MANDATE ON AFFIRMANCE

(Filed 7/5/60)

This cause having been duly argued before this Court by John A. Hartpence, counsel for the appellants and Arthur S. Kelsey, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Law Division, is affirmed without costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court and that the record be remitted to the Superior Court, Law Division, to be there proceeded

with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 5th day of July, 1960.

I. Grant Scott /s/
I. GRANT SCOTT
Clerk of the Superior Court

Notice of Petition for Certification

(Filed 7/25/60)

L-11501-58:
L-11507-58:
L-11806-58:
L-11807-58:

To: MARK D. KAPLAN, ESQ.,
JULES J. KELSEY, ESQ.,
Attorneys for Plaintiff-Respondent,
28 West State Street,
Trenton, New Jersey.

TAKE NOTICE that the defendant-appellants, MAURICE A. FINKLE, et als., will petition the Supreme Court of New Jersey for certification to the Appellate Division to review the final judgment of the Appellate Division entered in favor of the plaintiff-respondent in this action on July 5, 1960.

Dated: July 25, 1960.

John A. Hartpence /s/
JOHN A. HARTPENCE
Attorney for Defendants-
Appellants.

I hereby certify that the foregoing is a true copy of the original on file in my office.

I. GRANT SCOTT
Clerk.

Judgment of
Supreme Court of New Jersey

HOUSING AUTHORITY OF THE CITY OF TRENTON, *Plaintiff-Respondent,*

vs.

MAURICE A. FINKEL, et al., *Defendants-Petitioners.*

On Petition for Certification. Order Denying Petition. To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the third day of October, 1960.

JOHN H. GILDEA
Clerk
Clerk of the Supreme Court
A true copy
JOHN H. GILDEA
Clerk

Filed Oct. 3, 1960
John H. Gildea, Clerk

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1960

MAURICE A. FINKLE, etc., et al., *Petitioners,*

vs.

HOUSING AUTHORITY OF THE CITY OF TRENTON, et al.

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 28, 1961.
Dated this 30th day of December, 1960.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States.

FILE COPY

Office-Supreme Court, U.S.
FILED
APR 29 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 769

MAURICE A. FINKLE, Executor of the last will and testament of ISAAC FINKLE, deceased, MAURICE A. FINKLE and KATHARYN H. FINKLE, his wife, NATHAN N. FINKLE and BESS P. FINKLE, his wife, LESTER J. FINKLE and BESSIE H. FINKLE, his wife, BESSIE E. LUBIN, MAURICE R. BLOCK, CAROLYN LAVINE and TALBERT LAVINE, her husband, S. LESTER BLOCK and RUTH BLOCK, his wife,

Petitioners,

v.

HOUSING AUTHORITY OF THE CITY OF TRENTON, a body corporate and politic of the State of New Jersey,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

JULES J. KELSEY,
Attorney for Respondent,
28 West State Street,
Trenton, New Jersey.

ARTHUR S. KELSEY,
of Counsel and on the Brief.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 769

MAURICE A. FINKLE, Executor of the Last Will and Testament of Isaac Finkle, deceased, *et als.*, etc.,
Petitioners,

vs.

HOUSING AUTHORITY OF THE CITY OF TRENTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Statement of the Case

The facts, as disclosed and established by the pleadings, records and testimony, as set forth in the appendix filed with the court, are as follows:[1]

Petitioners were the owners of two parcels of real property known as Nos. 616-618 Perry Street, Trenton, New Jersey (D4a-38)(D15a-36) which were part of a larger tract known and designated as the Coalport Area, UR N. J. 13-1 (D4a-26)(D15a-24), hereinafter designated "Coalport Area".

By resolution of the Board of Commissioners of the City of Trenton adopted on July 28, 1955, the City's Planning

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[1] D denotes Appendix for Appellants filed in the Superior Court of New Jersey, Appellate Division; PA denotes Appendix to Petition for Writ of Certification; RA denotes Respondent's Appendix.

Board was authorized to make a preliminary investigation and hold a public hearing to determine whether Coalport Area was or was not a blighted area (D1a-37), and such a hearing was held on August 18, 1955 (D4a-17). The Board of Commissioners, on September 1, 1955, did, by resolution, affirm and approve the report of the Planning Board in its findings that Coalport Area was a blighted area (D4a-24).

The appraising of the parcels in the Coalport Area, estimated as in excess of 300 (D38a-27), commenced in 1954 (D35a-12) and was completed in 1956 (D35a-15). Vincent P. Bradley, who was Respondent's expert witness (D33a-15), was the appraiser (D35a-10). The acquisition of properties by Respondent was commenced in the fall of 1956. Respondent and Petitioners were unable to agree as to price and Respondent filed its complaints to condemn the properties on September 29, 1958 (D1a-5)(D12a-3).

The matters were initially heard before commissioners appointed to determine the value of the properties taken and from their report both parties appealed to the Superior Court, Law Division (D21a-1)(D22a-1). The actions were consolidated for trial and tried by a struck jury (D11a).

At the commencement of the trial, the jury viewed the premises (D33a-4), neither party having applied to the court pursuant to Rules of the Supreme Court of New Jersey, 4:92-7, to order otherwise.

Although not a part of the record, it may be noted that Coalport Area consists of approximately 20 acres, Petitioners' properties being situated on Perry Street, which is the southern boundary of the Area (D36a-16). The northern boundary is the main line of the Pennsylvania Railroad (D36a-14). Located within the area is the city incinerator (D38a-19). In the block on Perry Street where the Petitioners' properties are located, about 45% were residential units and the balance commercial (D38a-40), built between 60 and 75 years ago (D38a-39), in general.

not well-maintained (D39a-3), presenting a down-at-the-heels appearance (D39a-40), populated, in the words of one of the Petitioners, by an undesirable element (D180a-35).

With specific reference to the subject properties, it appears that No. 616 Perry Street consisted of a two-and-one-half story (D43a-15) frame store and dwelling built more than 54 years ago (D43a-6) on a lot 25 feet six inches wide and 95 feet deep (D41a-39). The first and second floors measured approximately 26 by 51 feet and the third floor was approximately 26 by 28 feet (D87a-3). The hallway leading to the residential area had sagged about two inches (D98a-29), with resultant cracks in the plaster carrying up to the second floor (D98a-31). The plumbing was damaged (D85a-15), the bathroof fixtures were of old vintage (D43a-24), and the structure was without a central heating plant (D43a-22). The residential area was rented until May, 1958 (D169a-38 to D170a-18). The store area of No. 616 will be described in conjunction with the store area of No. 618.

No. 618 Perry Street was a three-story brick building more than 58 years old (D166a-20) on a lot 24 feet wide by 95 feet deep (D120a-27), the building itself being 21 feet wide and 83½ feet deep (D120a-28). The second and third floors were used as living quarters by one of the Petitioners (D45a-7) and were so occupied as late as June 25, 1959, when he testified at the trial of the action before a jury (D147a-3)(D166a-10-15). This apartment was described by Respondent's expert witness as a "tremendous over-improvement for the neighborhood" (D44a-3). The apartment did not have a heating system separate from the store area (D109a-35).

The first floor of each building with the exception of hallways leading to the upstairs living quarters was occupied as a store (D43a-9)(D43a-30) operated by the Petitioners (D39a-20) at least to June 25, 1959 (D147a-3)(D168a-

20). The store had one of the oldest types of store fronts (D43a-10)(D43a-30) with a step up to the entrance door (D43a-9)(D43a-30), each section connected to the other by means of an archway (D43a-27), each section being on a different level (D98a-39), with a metal ceiling (D43a-38), a floor which required replacing (D43a-39), wiring perhaps 50 years old (D102a-5), and fixtures estimated to be at least 25 years old (D102a-9).

One real estate broker testified for the Respondent, and one real estate broker, one combination real estate broker and builder, and one builder testified as expert witnesses for the Petitioners.

Prior to summation, the parties agreed that the jury should return a single verdict (D185a-10)(D185a-15), and a verdict was returned in favor of the Petitioners in the amount of $26,000 (D217a-17).

Petitioners moved for a new trial (D220a-1) which motion was denied (D229a-20).

Petitioners then appealed from the judgment of the Law Division to the Appellate Division, and on July 5, 1966, judgment was entered affirming the judgment of the Law Division (PA8a) (opinion at PA1a). Petitioners petitioned the New Jersey Supreme Court for certification to the Appellate Division (PA9a) which petition was denied without opinion (PA10a).

Petitioners then petitioned the Supreme Court of the United States for a Writ of Certiorari to the Supreme Court of New Jersey.

REASONS FOR DENYING THE WRIT

ARGUMENT

POINT I

No substantial Federal question was presented to or passed upon by Supreme Court of New Jersey.

Petitioners, under the heading of "Jurisdiction" on page 3 of their petition, declare that: "Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 United States Code, Sec. 1257(3)." Said section provides that:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Nowhere in the petition is the validity of a New Jersey statute drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States. The Petition does allege that certain rulings of the trial court with respect to admission of evidence and requests to charge amounted to a denial to Petitioners of due process of law, equal protection of the laws, and the taking of their property without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States (Index to Petition, p. 34, p. 39).

But the Federal questions posed in the Petition for Writ of Certiorari were at no time at issue in the trial court. The entire record is bare of any suggestion by Petitioners at the trial level that the trial court's rulings in any respect impinged upon Petitioners' rights so as to constitute a

denial to them of due process of law, the equal protection of the laws, and the taking of their property, in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioners' brief on their appeal to the Appellate Division of the Superior Court likewise fails to bring into issue a Federal question. True, the brief makes reference to the "Constitutional exactions of Due Process of Law, the Equal Protection of the Laws, and the Law of the Land" (RA51a), and that the affirmance of the judgment below would result in a denial to Petitioners of "Due Process of Law, the Equal Protection of the Laws, and, since Magna Charta (Runnymede, 1215), their property and their possession, use and enjoyment thereof wrested from them, in violation of the Law of the Land;—and 'An American's house is no longer his castle'" (RA56a), but no cases are cited, no reference, specific or otherwise, is made to the Fourteenth Amendment to the Federal Constitution, or any other constitutional provision, the main thrust of their argument apparently being that the trial court's rulings as to the admission of evidence and request to charge constituted a denial of due process, etc.

Any doubt concerning whether a Federal question was presented to and passed upon by our State appellate courts should be dispelled by a reading of the Statement of Questions Involved in Petitioners' Appellate Division brief (RA1a), which by Supreme Court Rule 1:7-1(c), made applicable to the Appellate Division by Rule 2:7-1, must set forth "* * * each question separately, in the briefest and most general terms, without names, dates, amounts, or particulars of any kind * * * If the questions involved include any not presented to the court below, this fact should be noted. The foregoing requirements are to be considered in the highest degree mandatory, admitting of no exceptions: ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved."

It is submitted that the Statement of Questions Involved present no Federal question, and it is obvious from the opinion rendered by the Appellate Division (PA1a) that none was presented at oral argument or considered by that court.

In Petitioners' application to the Supreme Court of New Jersey for certification to the Appellate Division, a Statement of Questions Involved was again set out (RA57a). Several references in the Petition for Certification are made to "constitutional" questions (RA57a, 59a, 69a, 71a, 73a). There is completely lacking any allegation that Petitioners' rights under the Federal Constitution have been abused. As previously noted, the Petition for Certification was denied without opinion (PA10a).

It should be noted that the Federal constitutional question, if one was present, could have been presented squarely to the Supreme Court of New Jersey if Petitioners had elected to appeal to it from the unanimous affirmance of the judgment below by the Appellate Division. Rule 1:2-1 provides that:

> "Appeals may be taken to this court from final judgments:
>
> (a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State • • • "

It would appear to be without question that the jurisdiction of the Supreme Court to review state court judgments is limited to questions depending upon the Constitution, laws or treaties of the United States which have been necessarily passed upon by the highest state court. Thus in *Ellison* v. *Koswig*, 276 U. S. 598 (1928), certiorari was vacated because:

> "The grounds which were presented in the petition for certiorari, because of which the writ was granted,

> do not prove to have a substantial basis in the record because of the lack of assignment or error therein showing the proper presentation of federal questions to the Superior Court of the state."

The holding in the case of *Appleby v. Buffalo*, 221 U. S. 524 (1911), appears to be particularly applicable to the instant case:

> "In the case at bar an elaborate assignment of errors for the purpose of bringing the case to this court is found in the record, in which many rulings are referred to, which, it is alleged, resulted in deprivation of rights of Federal creation. But it is well settled that the assignment of error made for the purpose of bringing the case to this court cannot be looked to for the purpose of originating a right of review here. This must necessarily follow from the provisions of Sec. 709, which permit a review in this court of rulings concerning claims of Federal right which were set up and denied in the state court. Neither the petition for writ of error in the state court after judgment nor the assignments of error in this court, can supply deficiencies in the record of the state court, if such exist."

And even if Petitioners' sparse references in general terms to alleged deprivation of constitutional rights in the record below be deemed to satisfy the requirements set forth in *Ellison* and *Appleby supra*, nevertheless it is submitted that the writ should be denied because it is obvious that the state court judgment rested upon a non-federal ground. *Stembridge* v. *Georgia*, 343 U. S. 541, 547 (1951); *Bachtel* v. *Wilson*, 204 U. S. 36.

Finally, it is submitted that the Federal question, if there be one at issue, must be substantial. In this regard, petitioners have not shown " * * * the actual, practical effect of the disputed decision in its consequences for other litigants and in other situations." Vinson, *Work of the Federal Courts*, 69 S. Ct. V. As will be discussed more

fully under other points in this brief, the state court's rulings adverse to Petitioners' contentions might well have been otherwise under changed factual settings, and while the Petitioners could possibly benefit from a reversal, the holding would be of little or no precedental value.

POINT II

The rulings of the trial court on the questions raised by petitioners were in accordance with the law of New Jersey.

Various rulings of the trial court are alleged to be in error by the Petitioners. (Petition, pp. 4, 24) and it is said that Petitioners were thereby denied due process of law, the equal protection of the laws, and that their property was taken without just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States.

Respondent will undertake to show with respect to each ruling that it was in accord with the law of New Jersey.

A. Petitioners contend that the taking occurred prior to the filing of the condemnation complaint, that the value of the property decreased after a finding of blight and that the court's refusal to permit evidence to show value as of an earlier date and its refusal to so charge amounted to a denial of due process and of the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution (Petition, pp. 4, 27, *et seq.*).

It is true that despite the language of R. S. 20:1-9 providing for " * * * an assessment of the amount to be paid by the plaintiff for the land or other property and damages as aforesaid, as of the date of the commencement of the action," and the cases holding that "The proper measure of compensation is generally said to be the fair market value at the time of the institution of his condemnation

proceedings," *State by State Highway Commissioner* v. *Jones*, 27 N. J. 257 (1958); *New Jersey Highway Authority* v. *Wood*, 39 N. J. Super. 575 (App. Div. 1956), and in view of the constitutional provision that "Private property shall not be taken for public use without just compensation", Constitution 1947, Art. 1, par. 20, situations may arise where it becomes necessary to determine whether there was an actual taking by the condemning authority prior to the institution of the condemnation action.

Thus, the State Highway Commissioner is authorized to enter upon and take property in advance of making compensation therefor, R. S. 27:7-22, and if he exercised that right he would in all likelihood be required to compensate the owner according to the fair market value of the property at the time of the entry. *State by State Highway Commissioner* v. *Jones, supra; New Jersey Highway Authority* v. *Wood, supra.*

Not only did Respondent not enter upon Petitioners' lands prior to the institution of the condemnation action but Petitioners, or some of them, occupied the store area of both properties and the apartment of No. 618 Perry Street as late as June 25, 1959 (D147a-3) (D168a-20) (D166a-10-15).

Petitioners' argument was considered and rejected by the New Jersey Supreme Court in *Wilson* v. *City of Long Branch*, 27 N. J. 360, 373 (1958), cert. den. 358 U. S. 873, wherein the court held:

> "The novel argument is presented that prior to actual condemnation, the act permits a taking of property without just compensation in violation of *Art.* I, *par.* 20 of the 1947 Constitution. Plaintiffs point out that N. J. S. A. 40.55-21.10 says that after a determination that an area is blighted, the municipality 'may, *but shall not be required to* acquire the real property within the area by purchase, or by eminent domain proceedings * * * ' and may redevelop it. And they urge that the 'very determination of

blight in itself constitutes a taking of property' because its market value is thereby lessened or destroyed, and with the threat of condemnation hanging over it, they cannot sell or improve it. In effect, they say that a statute is contrary to our basic law which permits a municipality to impair the value of property and restrict its use by a declaration of blight without requiring compensation for such loss. But this is not a taking in the constitutional sense. It is akin to the result which flows from municipal zoning. If some diminution in market value can be said to follow from a finding of blight inspired by the valid exercise of police power, it is *damnum absque injuria*. As Justice Heher said in *Mansfield & Swett, Inc.* v. *Town of West Orange, supra*:

> 'The principle is firmly established in our federal jurisprudence that injury to private property ensuing from governmental action in a proper sphere, reasonably taken for the public good, and for no other purpose, is not necessarily classable as a "taking" of such property within the intendment of the constitutional guaranties against the deprivation of property without due process of law, or the taking of private property for public use without compensation. • • •
>
> 'A limitation of private property rights in land to the extent reasonably necessary to meet a public exigency is justifiable under this sovereign power. *Block* v. *Hirsh*, 256 U. S. 135, 41 S. Ct. 458, 459, 65 L. Ed. 865. Ordinarily, a course of action may be deemed to be in the public interest when it fairly tends to promote the good of the community at large. *State Board of Milk Control* v. *Newark Milk Co.*, 118 N. J. Eq. 504. And an ulterior public advantage may support "a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use." *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 S. Ct. 186, 188, 55 L. Ed. 112.' "

Concerning what constitutes a taking in the Federal view, this court stated in *Danforth* v. *United States*, 308 U. S. 271, 285 (1939):

> "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

And in *United States* v. *Dickinson*, 331 U. S. 745, 748 (1946), it was expressed thusly:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in the course of time."

Petitioners cite *United States* v. *Miller*, 317 U. S. 369 (1942) in support of their argument. Aside from the fact that the case concerned criteria of value for use by the Federal courts and this court held that local law did not apply (pp. 379-380), it is respectfully submitted that the case does not stand for or support the proposition that a condemnee has been denied due process of law and the equal protection of the laws, and constituted a taking of property without just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States because his state law limits opinion evidence as to value to the date of the commencement of the action without regard for enhancement or decrease in value because of governmental action prior thereto.

B. Petitioners contend that Respondent's expert witness on direct examination gave a separate valuation to the land and to the buildings and that when Petitioners' experts attempted to testify in like manner, Respondent's objections to this form of testimony was sustained. Petitioners moved to strike Respondent's expert testimony

(D71a-19-24) which motion was denied (D71a-30). They assert that this constitutes a denial of the equal protection of the laws.

Both the trial court (D122a-33 to D123a-10) and the Appellate Division (PA4a) concluded that Respondent's expert did not give a separate valuation for land and buildings.

In their brief on the appeal to the Appellate Division, Petitioners did not question the propriety of the trial court's ruling on the motion to strike the testimony of Respondent's expert witness but, as indicated in question number 3 of Statement of Questions Involved (RA1a), the only error alleged is the refusal of the court to permit Petitioners' witnesses to testify separately with regard to the value of the land and buildings in view of Respondent's expert testimony which was not objected to by Petitioners.

New Jersey cases clearly support the Court's ruling in denying Petitioners' motion to strike because said motion was not timely. *Beam* v. *Kent*, 3 N. J. 210, 216 (1949); *Hensgen Bros., Inc.* v. *Grip*, 13 N. J. Super. 105, 113 (App. Div. 1951).

Petitioners' offer of testimony as to the separate values for land and buildings was also properly rejected. *Della Sala et al.* v. *Parking Authority of City of Hackensack*, 30 N. J. Super. 534, 542 (App. Div. 1954). And the offer to prove reproduction cost of the buildings less depreciation (which would have necessitated a separate valuation for land and buildings) was rejected in accordance with state law. *Della Sala, supra*; *State* v. *Burnett*, 24 N. J. 280, 289 (1957).

C. Petitioners raise the question of the court's rejection of testimony to the effect that an agreement had been reached between Petitioners and Respondent (petition, p. 39).

Petitioners never made a specific offer of what they expected to prove by the answer of the witness, Supreme Court Rule 4:44-3, and it is mere conjecture to attempt to assay its possible effect on the jury. *State* v. *Gorga*, 54 N. J. Super. 520, 525 (App. Div. 1959). *New Jersey Highway Authority* v. *Rudd*, 36 N. J. Super. 1, 5 (App. Div. 1955). The entire testimony on this point is set out at D173a-10.

D. Petitioners complain of the court's ruling excluding testimony as to the "cost of maintenance of the property over the years" (petition, p. 40). One of the petitioner's who resided in the property (D166a-15) was asked on direct examination:

> "Q. Can you state approximately how much you spent by way of maintenance of those buildings, 616 and 618 Perry Street during the past years that you referred to when maintenance improvements were made?" (D176a-34)

The question was objected to on the grounds that the question was too broad, without limitations as to time, and lacked materiality (D176a-39). The objection was sustained (D177a-31).

If for no other reason, it is submitted that the court's ruling was correct since nothing had been done by the witness except installing a new plate glass in the front (D171a-1-18); and that no substantial improvement had been made to No. 618 Perry Street for the last six years (D179a-16-20). Since the search is for the fair market value of the properties at the time of the institution of the condemnation proceedings, *State* v. *Jones*, *supra*, there can be no quarrel with this exercise of the Court's discretion. *New Jersey Highway Authority* v. *Rudd*, *supra*, at page 3.

E. Objection is also made of the court's excluding evidence as to the cost of moving the business located on the premises (petition, p. 40). It should be noted that Peti-

tioners did not intend to move the business but, rather, to dispose of the stock (D175a-24-28).

Removal costs have been held not to be an element of damage for which compensation is to be paid. *City of Newark* v. *Cook*, 99 N. J. Eq. 527, 537 (Ch. 1926), affirmed without opinion, 100 N. J. Eq. 581, 582, 583, 584 (E. & A. 1927); *City of Newark* v. *Eisner*, 100 N. J. Eq. 101, 103 (Ch. 1926); as to other jurisdictions, *United States* v. *General Motors*, 323 U. S. 373, 379 (1945); 1 Orgel, *Valuation Under Eminent Domain* Sec. 69.

F. The court's refusal to charge Petitioners' Request to Charge No. 1 (D219a-2) concerning loss of business is also attacked (petition, p. 41). This request was taken from the the case of *Lenzner et al.* v. *City of Trenton*, 22 N. J. Super. 415, 423 (Law Div. 1952) wherein the City of Trenton undertook to acquire land which had been operated profitably for many years as a parking lot and to use the land for the same purpose. On appeal, *City of Trenton* v. *Lenzner, et al.*, 16 N. J. 465 (1954), the Supreme Court did not see fit to state the proposition so baldly. It is respectfully suggested that the court, by implication at least, leaned to the view that "it is proper to take into consideration the existence of a going business on the land in question as indicative of the highest economic use to which the land may be put", quoting from *Housing Authority of City of Bridgeport* v. *Lustig*, 139 Conn. 73, 90 A. 2d 169 (Sup. Ct. Err. 1952).

The court's charge embraced the quotation cited above from the *Bridgeport* case, *supra*, and stated further that "business profits are not subject to independent compensation, aside and apart from market value of the premises which is condemned upon which the business has been operated" (D211a-20-33). Apart from the fact that Petitioners' business had been declining steadily and that at the time of the condemnation there was very little business (D179a-25-31), the court's charge was in accord with the

decision in *New Jersey Highway Authority* v. *Rue*, 41 N. J. Super. 385, 387 (App. Div. 1956); *United States* v. *General Motors, supra.*

G. Petitioners also urge that the trial court erred in refusing to set aside the verdict, that the Appellate Division erred in affirming the judgment below, and that this resulted in a denial of substantial justice to them (petition, p. 44).

The law in New Jersey is that "a verdict of a jury shall not be set aside as against the weight of the evidence if, having given due regard to the opportunity of the trial court and the jury to pass upon the credibility of the witnesses, it does not clearly and convincingly appear that the verdict was the result of mistake, partiality, prejudice or passion." Rule 1:5-3(a), made applicable to the Appellate Division by Rule 2:5; *Coll* v. *Sherry*, 29 N. J. 166 (1959).

Petitioners assert basically that their expert witnesess were entitled to greater weight than Respondent's. In a somewhat similar situation, *Hartpence* v. *Grouleff*, 15 N. J. 545 (1948), the Supreme Court declined to disturb an order refusing a new trial, holding at page 173:

> "We experience a similar reluctance to disturb an order refusing a new trial where the error assserted is largely a matter of how much weight should be accorded the expert medical testimony of the physicians appearing for either side * * *."

A review of the testimony reveals that the jury, having experienced a view of the premises (D33a-3), was exposed to conflicting testimony as to the fair market value of the subject properties by the expert witnesses of both sides. Petitioners' two real estate experts, William F. McCarthy and Wilson O. Bachman, testified, respectively, that the fair market value of the properties, considered as a unit, were $68,578 (D90a-38) and $55,200 (D121a-24), and Mr. Bachman stated why in his opinion the sale of properties

alleged to be comparable by Respondent's expert were not in fact comparable (D143a-8)(D143a-34)(D144a-9), and testified concerning sale of properties which he deemed comparable and supported his opinion of fair market value (D125a-30)(D138a-28)(D140a-8)(D141a-20)(D142a-10), and each testified as to the excellent condition of No. 618 Perry Street (D85a-26)(D124a-28), as did Mr. Matthew Di Nola, a builder (D114a-36); and Mr. McCarthy stated an investor could realize 5-6% on his investment of $68,578 (D93a-38) as compared to Mr. Bachman's estimate of about 9% (D163a-38).

On cross-examination, the dissimilarity between Mr. Bachman's alleged comparables and the subject properties was clearly illustrated. Thus 502-510 Perry Street was a corner lot (D157a-15) 100 feet by 100 feet with an eight room residence to the rear of the store (D157a-34); 606 Perry Street was a 12-family apartment house (D58a-16) without a store (D159a-16) and Mr. Bachman had no knowledge of the income being derived from the property at the time of its sale to Respondent (D159a-20); No. 600 Perry Street was a corner property (D159a-30) and was used as a gasoline station (D159a-27); and No. 183-185 Jefferson Street was a brick church building (D160a-8), erected and used as a church at the time Respondent acquired it (D160a-5-10).

The jury also had the benefit of the testimony of Respondent's expert, Vincent P. Bradley, a real estate broker with 53 years of experience (D33a-20). His opinion as to the fair market value of the properties, viewed as a unit, was stated to be $23,400 (D41a-28), and he testified as to several sales in the neighborhood of properties which he deemed comparable (D45a-20)(D45a-40)(D46a-15), as well as to the possible net return (8 to 9%) an investor might derive at such a price (D51a-32).

In addition, the jury had presented to it testimony that the properties were located in a blighted area (D4a-24),

that No. 616 Perry Street was in poor condition (D124a-19), that the residential area of No. 618 Perry Street was a tremendous over-improvement for the neighborhood (D44a-3) and that the store area of each was old-fashioned (D43a-8)(D43a-30) with antiquated fixtures (D102a-9) and wiring (D102a-5), and that both buildings were over 50 years old (D43a-6)(D166a-20).

The thrust of Petitioners' argument in this connection seems to be that, because Mr. Bradley was the sole witness for the Respondent and the Petitioners had three expert witnesses, the jury was under a duty to reject Respondent's testimony and accept that of Petitioners' experts, although Petitioners do not indicate whether the jury should have accepted Mr. McCarthy's or Mr. Bachman's opinion as to value.

In support of this argument Petitioners cite several early cases (petition, p. 42) but a reading of them reveals that in each, the court found surrounding circumstances which buttressed its conclusion as to which side should prevail, and none of the cases concerned themselves with the opinion evidence of experts.

But it is evident that the testimony was fairly susceptible of divergent inferences, and in such a case an appellate court should not intervene, there being no showing by the Petitioners that the verdict was the result of mistake, partiality, prejudice or passion. *Wytupeck* v. *City of Camden*, 25 N. J. 450, 466 (1957); *Hager* v. *Weber*, 7 N. J. 201 1951); *Healing* v. *Security Steel Equipment Corp.*, 51 N. J. Super. 123 (App. Div. 1958); *Della Sala et al.* v. *Parking Authority of City of Hackensack*, 30 N. J. Super. 534 (App. Div. 1954); *Application of Port of New York Authority et al.*, 28 N. J. Super. 575 (App. Div. 1953); *Application of Housing Authority of City of Bayonne*, 21 N. J. Super. 254 (App. Div. 1952).

A number of cases decided by this court are cited in support of the proposition that it "can review the record of the State Courts' findings of fact under the circumstances disclosed by the full record in the case under review" (petition, p. 44) but it is submitted that in each one a Federal question was presented to and passed upon by the State Court.

H. Petitioners also urge that permitting the jury to view the premises and its charge in this connection constituted error (petition, p. 45 *et seq.*).

The court charged the jury in this respect:

> "You have had an opportunity to view the premises. You may make use of that view of the premises in forming your judgment of the testimony and in reaching an opinion upon its consideration. Your opinion upon questions you are to decide should be based upon the testimony as thus understood by you and applied to what you have seen. It may well be that your judgment of the testimony may in some cases be modified, and in extreme instances perhaps be controlled as a result of your view of the premises. It may well follow as to some testimony, that to understand it in the light of your view is to discredit it, while as to other testimony, to so understand it is to accept it, even in the face of contradiction and denial." (D212a-15-26).

This charge was taken verbatim from the case of *State by State Highway Commissioner* v. *Gorga, supra,* 54 N. J. Super. at page 527.

In that case, the court had charged additionally "the view of the land, to my mind seems to be the controlling factor in the ultimate result in matters of this kind" and objection was made that this portion of the charge might be taken as an authorization to the jury to use their view of the land as evidence. Nevertheless, the court held that the charge, read as a whole, was a proper one and not in

derogation of the principles expressed in *Hinners* v. *Edgewater and Fort Lee R.R. Co.*, 75 N. J. L. 514, 519 (E. & A. 1908) from which the charge in the instant case was derived.

At the trial, no objection was made to the charge and Petitioners asked the Appellate Division to notice it under the plain error rule R. R. 1:5-3(c) (RA55a). The court found no error (PA7a).

It should be noted that if Petitioners were of the opinion that a view of the premises would prejudice their rights, they could have requested the court to order otherwise, but they did not do so. Rule 4:92-7.

I. At pages 48 *et seq.*, Petitioners attack several parts of the Appellate Division opinion. Each is answered in the order set forth in the petition.

(a) The trial court (D207a-33) and the Appellate Division (PA4a) were each of the opinion that Respondent's expert, Mr. Bradley, did not value the land and buildings separately, and a fair reading of his testimony (D42a-14-34) (D50a-36 to D51a-4) can but result in a similar conclusion. In each instance he stated that his determination was based upon what he could sell the two properties as a unit. Even a lay jury knows that buildings are not sold apart from land.

(b) In this connection all that Mr. Bradley said was that the Petitioners had used the property as a combination home and business (D46a-32-36), and the Appellate Division's conclusion was probably intended to mean that the "buildings were not originally designed for the commercial purposes to which they had been adapted" by the Petitioners (PA6a).

(c) The Petitioners were not the original owners of the land when the buildings were erected (D43a-6). There is much testimony by Petitioners' expert, Mr. McCarthy, that the buildings would not be rebuilt in the same manner

(D99a-10-35) (D103a-19-30) and the court's conclusion that "it is inconceivable that they would be rebuilt as they are now" (PA7a) is supported by the evidence that one of the buildings was without a central heating plant (D43a-22), that the store had one of the oldest type of fronts (D43a-10) (D43a-30); with a step up to the entrance door (D43a-9) (D43a-30), each section connected to the other by means of an archway (D43a-27), each section being on a different level (D98a-39), with a metal ceiling (D43a-38), wiring perhaps 50 years old (D102a-5) and fixtures estimated to be at least 25 years old (D102a-9).

(d) The Respondent instituted its condemnation action on September 29, 1958 (D1a). One of the Petitioners testified that the last tenant of 616 Perry Street moved out in May, 1958 (D179a-17) and that the tenant had been responsible for maintenance (D170a-32).

It was the opinion of Petitioners' principal experts that No. 616 Perry Street had no value above the first floor (D124a-19) (D97a-40).

(e) The Appellate Division did not imply "a failure of proof chargeable to the petitioners" (petition, p. 49). But Petitioners did fail to avail themselves of an opportunity to cross-examine Respondent's expert in this area and his opinion as an expert was entitled to be considered by the jury.

(f) It is submitted that the Appellate Division correctly found that the Petitioners did not state to the trial court that they wanted Mr. McCarthy, one of their experts, to "give a separate valuation of the land and buildings 'to show the bases upon which he reached that opinion' that the properties were worth $68,578" (PA4a). The references in petitioners' Petition (RA64a) do not indicate to the contrary.

However, if petitioners had stated to the trial court that it was their purpose to have Mr. McCarthy testify as to

separate valuation for land and buildings for the purpose of showing the method by which he reached his total valuation, such an offer would have been properly excluded. Thus, in *Della Sala* v. *Parking Authority of City of Hackensack*, 30 N. J. Super. 534 (App. Div. 1954), the transcript of the testimony at the trial level appearing in Vol. 510, Superior Court Briefs, 1953-54, at P13a-20, indicates that the trial court rejected an offer by the landowner's expert to testify separately as to the value of the land and buildings, stating "It is a total of the land and buildings. You can't break up and say a building is worth so much and the land is worth so much, any more than you can evaluate a tree or bush on it. That is what enhances the value of the land." The Appellate Division found no error.

(g) A reading of the referred to quotations from Mr. Bradley's testimony supports the Appellate Division's analysis, especially when read together with his testimony at D57a-15 to end of page.

Petitioners contend that the jury "entirely disregarded the competent testimony, and picked their verdict out of the air" (Petition, p. 51). But this argument disregards the analysis of the evidence by the Appellate Division, which might well have influenced the jury in arriving at its determination (PA3a *et seq.*) and completely overlooks the function of the jury in an eminent domain case. As was so aptly stated in *Application of Port of New York Authority*, 28 N. J. Super. 575 (App. Div. 1953):

> "Assuredly the fair value of land sought to be taken by the exercise of the power of eminent domain may be shown by the opinions of qualified expert witnesses. The interrogation of expert witnesses normally constitutes the most practicable medium of supplying the hypotheses by which the jury may be aided in determining value • • •
>
> "Experience has disclosed that both optimism and pessimism may be found to exist in the minds of expert witnesses. *The measure of faith and trust to be reposed in the testimony of expert witnesses is*

> *pre-eminently the concern of the jury.* Moreover in cases of this class the jury is afforded an opportunity personally to view all of the physical characteristics of the property requisitioned. * * * " (Emphasis supplied)

Moreover, according to the holding in *State Highway Commission* v. *Mayor and Board of Alderman of Town of Dover*, 109 N. J. L. 303 (E. & A. 1932), the jury could have returned a verdict in an amount less than any of the expert valuations, the court stating:

> "The appellant next contends that, because real estate experts valued the lands in question at various figures from $22,498.28 to $31,200, there is no evidence to sustain the verdict for $7,500. But this is not necessarily true. Expert testimony is not necessarily binding upon the jury. The jury may adopt so much of it as appears sound, reject all of it, or adopt all of it: 10 R. C. L. 218; Hinners v. Edgewater & Fort Lee Railroad Co., 75 N. J. L. 514. The verdict represents the judgment of the jury, after viewing the premises and considering all of the evidence with respect to the value of the land."

Finally, it has been held by this court in eminent domain cases that:

> "When property is taken by eminent domain it equally is recognized that there must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally. *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 575, 576. As it is put in the case most frequently cited in favor of the right to a writ of error, 'we are permitted only to inquire whether the trial court prescribed any rule for the guidance of the jury that was in absolute disregard of the company's right to just compensation.' And again the final judgment of a state court 'ought not to be held in violation of the due process of law enjoined by the Fourteenth Amendment unless by the rulings upon questions of law the company was

prevented from obtaining substantially any compensation.' *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226, 246, 247; *Appleby* v. *Buffalo*, 221 U. S. 524, 531, 532."

Conclusion

Respondent submits that no substantial Federal question was presented to or passed upon by the Supreme Court of New Jersey, or, for that matter, by the trial court or Appellate Division; that if it be deemed that a Federal question was decided by the State court, nevertheless, it is clear that the State court judgment rested upon a non-federal ground; and that the question presented is not one of substance.

It is further submitted that the various rulings complained of by Petitioners as error was determined in accordance with state law, and were not in conflict with the Constitution or laws of the United States; and if there was error, it was not such error as prevented Petitioners from obtaining substantially any compensation.

Finally, Petitioners have not demonstrated that the case presents important questions respecting standards for valuing property taken for public use or that there is an apparent conflict in the decisions respecting same.

For the above-stated reasons, it is submitted that this honorable court should not entertain the jurisdiction of said cause and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JULES J. KELSEY,
Attorney for Respondent.

ARTHUR S. KELSEY,
of Counsel and
on the Brief

RESPONDENTS' APPENDIX

APPELLANTS' BRIEF IN SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Statement of Questions Involved

Did not the Court err:

1. In refusing to grant defendants' motion to set aside the verdict of the jury and grant a new trial on the ground of the overwhelming weight of the evidence in favor of defendants?

2. In ruling September 29, 1958, as the effective date for the fixing of value of the subject properties, in refusing to charge defendants' request No. 2 (D219a-15-25), and in excluding evidence tending to show the damaging effect of delay?

3. In refusing to permit defendants' witnesses to testify separately with regard to building value and land value especially in view of having permitted like testimony from plaintiff's only witness?

4. In barring defendants' offer of testimony as to replacement cost less depreciation?

5. In limiting the finding of the award by the jury to the price as between a willing buyer and a willing seller as of September 29, 1958?

6. In refusing to admit testimony by defendants' witness, Mr. Bachman, respecting certain comparable properties?

7. In refusing to grant defendants' request to charge No. 1 respecting damages, both present and prospective, etc.? (D219a-3-12).

8. In refusing to allow one of the owner defendants to testify to the cost of moving?

9. In refusing to permit Maurice A. Finkle to testify regarding the cost of maintenance?

10. In refusing to permit Maurice A. Finkle to testify whether or not agreement had been reached with plaintiff regarding compensation?

11. In charging the jury that they could make use of their view of premises in forming judgment of testimony and reaching a verdict? (Not argued below).

Statement of Facts

This is an appeal from a judgment of the Superior Court of New Jersey, Law Division, Mercer County, in a civil action instituted by plaintiff, Housing Authority of the City of Trenton, against Maurice A. Finkle and others, defendants, to acquire two properties of the owners located at No. 616 and No. 618 Perry Street, Trenton, New Jersey, in the exercise of plaintiff's asserted power of eminent domain, for the purpose of clearing an alleged blight area, the boundaries of which are shown on the map marked P-1 in evidence (D36a, 37a) (D183a-20), and which is referred to as the Coalport Area or Project (D56a-29). A separate complaint was filed as to each property (D1a-1), (D12a-1), and the Commissioners made a separate award in each, awarding $12,800.00 for No. 616 and $30,300.00 for No. 618, a total of $43,100.00 (D9a-25) (D20a-28). From those awards appeals were taken by the plaintiff (D10a-1) (D21a-1), and cross appeals were taken by the answering defendants (D11a-1) (D22a-1). On the trial of those appeals before the jury, the separate actions were consolidated for the purposes of the trial (D185a-10), (D206a-15), and the jury rendered its verdict accordingly, awarding $26,000.00 in favor of the landowners for the combined properties (D217a-16). An order for judgment was entered pursuant to the verdict, dated July 2, 1959, and filed July 6, 1959 (D23a-1). An order was also entered, dated July 2, 1959, and filed July 6, 1959, authorizing and directing the Clerk of the Superior Court to accept payment by the plaintiff of said sum of $26,000.00 (D24a-1). The answering defendants gave notice of a motion for a new trial on the ground that the verdict was contrary to the weight of the evidence, reserving all objections, exceptions and rights (D24a-25), (D220a-25), but the motion was denied by order dated August 4, 1959, filed August 10, 1959, (D25a-10), (D229a-20). An objection to the Court's finding was noted on the record (D229a-21). Appeal to the Appellate Division by the present defendants-appellants followed which is now before this Court for determination (D26a-1).

A brief summary of relevant events, commencing several years prior to the institution of the condemnation suits, may not be inappropriate. In 1954 steps were taken by both Federal and local authorities to evaluate and evacuate the area involved in the Coalport Project, and Mr. Vincent P. Bradley, who later became the sole witness for the Housing Authority in its behalf in determining the value of the properties taken, had been retained by both the Federal agency and the Housing Authority to interview the occupants of the area and appraise the value of the properties involved, and commencing in 1954 and finishing in 1956 he made a complete appraisal of the entire area (D35a-12-15). In September, 1955, the governing body of the City of Trenton, by its Resolution No. A3971, approved and affirmed in all respects the report of the Planning Board and its findings determining that the conditions existing in that area constituted a blighted area (D15a-19-26), and thereupon authorized and empowered plaintiff, the Housing Authority of the City of Trenton, to negotiate for the acquisition of all the properties in the area for clearance and later disposition in the exercise of its claimed legal functions (D15a-27-29).

Soon thereafter, the Housing Authority, which, in conjunction with the Federal agency, had been examining and appraising the properties in the area since 1954 (D35a-12) negotiated with the owners of the 300 or more properties involved in the clearance project, and began to acquire the properties as early as 1956. Meantime, occupation, sales, rentals, maintenance, improvements, and business and residential functions and activities waned, diminished, and eventually ceased and vanished.

So that, when plaintiff, the Housing Authority, on September 29, 1958, filed its complaints to acquire the two properties located at No. 616 and No. 618 Perry Streets from their owners, the contesting defendants herein, almost all of the structures had been demolished, and but few remained in the devastated area (D169a-10), (D169a-27-30). The subject properties of defendants and a few others nearby were still standing.

On November 20, 1958, the Superior Court of New Jersey, Law Division, appointed three Commissioners, in each case, to hear the proceedings,—namely, Judge J. Wilson Noden, former County Clerk Albert H. Rees, and Mrs. Margaret Coghlan, a resident of Princeton, New Jersey. They viewed the premises and commenced their hearings on March 19, 1959, and concluded the hearings on March 23rd; on March 30th they submitted their report, awarding $12,800.00 for No. 616, (D8a to 9a), and $30,300.00 for No. 618, (D19a to 20a) a total of $43,100.00 for the combined properties, as above noted.

From those awards appeals were taken by the Housing Authority to the Superior Court, Law Division, on April 23, 1959, (D10a-1, and D21a-1); and cross-appeals were taken by the defendants-owners on May 7, 1959 (D11a-1 and D21a-1); and, as above indicated, the appeals came on for hearing before Hon. Arthur S. Lane with a jury on June 25, 1959 and concluded on June 30th. The two actions were combined for the purposes of the trial, the jury awarded a lump sum of $26,000.00 to the owners, judgment was entered and the award paid into Court accordingly. A motion was made by defendants for a new trial, which was denied, and the present appeals were then taken by the defendants-appellants (D26a).

ARGUMENT

POINT I

The Court erred in refusing to grant defendants' motion for a new trial on the ground that the verdict of the jury was contrary to the clear weight of the evidence.

A brief analysis of the testimony of the witnesses may tend to clarify the evidence adduced and simplify the situation presented.

Vincent P. Bradley, an employee of the Housing Authority, was the only witness called by plaintiff. He testified that, in his opinion, the value of 616-618 Perry St. was $22,400. (D41a-29). It is herein contended that plaintiff failed to establish the value of these subject premises by reason of the fact that Mr. Bradley was the only witness and the quality of his testimony was such that when taken as a whole it adduced virtually nothing upon which a jury could base a competent award. A resume of Mr. Bradley's testimony is hereinafter set forth:

To support his estimate of $22,400.00 as the total value of the premises he offered only three properties–namely, 620 and 622 Perry Street (treated as one unit), (D45a-19); 624 Perry Street (D45a-40), and 545 Perry Street (D46a-15).

It is respectfully urged that these properties are in no wise comparable and from no standpoint could be a basis upon which a true value of the subject premises could be determined. The premises known as 620 and 622 Perry Street had a total lot frontage of only 32 feet in width and a depth of 95 feet (45a-24) whereas the lot dimensions of the subject properties were 49 feet 5½ inches in frontage and a depth of 95 feet (D42a-8). Moreover, 620 Perry Street was occupied on the first floor as a barber shop with wash room and toilet, renting at $65.00 a month (D53a-27-28). The barber shop, according to plaintiff's witness, had a depth of 24 to 25 feet (D52a-36) and an exterior width measurement of only 14 feet (D52a-24). The premises above the

barber shop were occupied by the owner (D53a-29). The interior area of the barber shop thus comprised less than 350 square feet. Considering the yearly rental of the barber shop of $780.00, the yearly rental per square foot was $2.23.

The 622 building was rented on the first floor as a cigar store at a monthly rental of $65.00 (D45a-34). The depth of the store was 23 feet (D53a-7). Although Mr. Bradley stated that there were rooms behind the store (D53a-7), his testimony was that the $65.00 rental was for the cigar store (D45a-34). The residence above 622 rented for $55.00 per month (D45a-36).

Although the side wall of 620 Perry Street was bulging (D172a-23), Mr. Bradley testified that he could not from his own knowledge state the condition of that westerly wall (D54a-18-20). Yet the property at 620 and 622 Perry Street was purchased by the plaintiff in January, 1958, for $20,000. (D45a-23-24), despite the bulging wall, the bad shape of the back roof and the difference in size of those buildings (D172a-21-23).

Mr. Bradley used as another comparable property the one known as 624 Perry Street. That building was on a lot 18 feet in width, 95 feet in depth (D52a-21) upon which there was a three story structure being 30 feet deep and a 2 story brick extension 13 x 16 feet and had a store 25 to 26 feet in depth (D53a-9-14). Mr. Bradley testified that he inspected 624 Perry Street in 1954 and learned that the entire building brought $40. a month (D55a-3-6). Despite this very low rental the plaintiff paid $11,000.00 therefor (D46a-11). The properties known as 620, 622 and 624 Perry Street, having together the same width as the subject premises were acquired by the plaintiff at a combined figure of $31,000.00. Yet, these properties could be compared in no way, either as to size, condition, and usage with the subject premises. Thus, the subject premises, under one ownership, had an additional advantage of plottage over the 620-622 and the 624 properties.

The only other alleged comparable sale submitted by Mr. Bradley was one known as 545 Perry Street (D46a-15), purchased at a price of $10,000.00 (D46a-23). The property was on a lot 25 x 100 (D46a-15). Although Mr. Bradley testified that the property was in good condition his testimony was contradicted by Mr. Bachman, one of the experts called by the defendants.

Mr. Bachman testified that 545 Perry Street was rejected as a comparable in that he "talked to Mr. O'Donnell who at one time bought this property, and he told me that at the time of the sale it was in very, very bad condition. It is only a 25 x 100 foot lot. It has a three story brick building on it. But again, it did not, because of its size and because of the fact that it was represented to me to be in very bad condition, I did not use it as a comparable." (D144a-18-24).

Mention might here be made that Mr. Bradley was in the employ of the plaintiff, The Trenton Housing Authority, and in that capacity appraised the entire Coalport area (D35a-12-15). He estimated that there were between 304 and 325 individual parcels in that area (D38a-27). Although he appraised every parcel and had available the information on every one, it is surpising that he failed to present any proper comparable sales. None of the three alleged comparables had a lot 50 x 95, nor could any of his comparables compare in condition, building size or utilization with the subject premises.

Some pertinent testimony concerning the subject premises follows:

There was an archway between 616 and 618 Perry Street on the first floor, and, as a result, was used as one parcel. (D42a-11-12). Incidentally, Mr. Bradley, the only witness for the plaintiff, admitted that he made no interior measurements of the property excepting his act in stepping off the store dimensions (D48a-31-39).

The inside measurments of the store were, however, made by Mr. Wilson O. Bachman, one of the expert witnesses produced by the defendant. Mr. Bachman testified that the first floor of 616 Perry Street had a square foot area of 1225 feet (D120a-22) and the first floor of 618 contained 1743 square feet (D120a-31). Thus, there was an open business area on the first floor of the two properties amounting to 2968 square feet.

It is respectfully urged that a barber shop on a lot 14 feet in width (D52a-24) comprising less than 350 square feet and renting for $65.00 per month (D45a-26) and a cigar store of approximately the same area and also renting for $65.00 per month cannot be compared in any way with a well-known retail establishment having an area of almost 3000 square feet as mentioned above. Mr. Bradley admitted in his testimony that "the Finkle store was the only store of any size in the block. This was the only store of its type." (D44a-25-27).

Reference is now made to Mr. Bradley's testimony in comparing the condition of 616 Perry Street with that of 618. He testified that the second floor of 616 Perry Street was in "very poor condition" (D43a-24), that the building was of frame construction (D50a-29-30). He further testified that the condition of 616 Perry St. was "very poor" (D50a-24). He testified that 616 had a square ft. area of 2492 feet (D50a-17) and estimated the value of the building alone as $7,000. (D50a-11; 42a-17). He then testified concerning the condition of 618 Perry St., stating that it was a brick building, "excepting the sun porch rear 22 x 16 feet, that was frame, second floor." Of 618 Perry Street he stated: "The house part, however, is in very fine condition and is a tremendous over-improvement for the neighborhood. It has a super-modern kitchen, a tile bath and parquetry floors, oak floors, very nicely planned rooms, and makes a very comfortable residence, which you cannot call an apartment because it is on two floors. It has a sun-porch in the rear that can be used as a sleeping porch. It is unheated. And those two floors are very nicely modernized, quite attractive. But, of course, as I said before, a lot of money has been wasted in them because of the over-

improvement out of character with the neighborhood" (D44a-3-13). "Well, I would feel that the Finkles have been very happy and comfortable there because they do not live outside of the property. The get up in the second and third floor and they are in another world. And I would think they would be very comfortable." (D45a-7-11).

Further testimony elicited from Mr. Bradley was that the store in 618 "has a depth of about 80 feet and is all on one level, and there is a good full basement. I found an adequate hot-water heating plant, oil-fired, and domestic hot-water supply" (D43a-33-36). The building at 618 had, according to Mr. Bradley, an area of 4150 square feet (D50a-20), and he placed a value on this building of $11,650.00 (D50a-14).

Worthy of note is the evident method by which Mr. Bradley set the relative building values of 616 and 618 Perry Street. His testimony, as above mentioned, was that 616 had a square foot area of 2492 feet (D50a-17) and he placed a value on that building of $7,000.00. (D42a-17; 50a-11). If $7,000.00 is divided by 2492 the resultant figure is $2.80 per square foot for 616. Concerning 618 Perry Street he stated the square foot area to be 4150 (D50a-20) and the building he valued at $11,650.00 (D50a-14). If the same formula is used–namely, dividing $11,650.00 by 4150, the resultant answer would again be $2.80 per square foot, precisely the identical figure as given per square foot for 616 Perry Street. In view of his own testimony contrasting the condition of 616 with 618 Perry Street, wherein he stated that 616 was in very poor condition (D50a-24) and of frame construction (D50a-29) and had old plumbing and wiring and fixtures (D43a-19) and the apartment was without a central heating plant (D43a-22), whereas 618 was a 3 story brick building, the house part being in "very fine condition" (D44a-3), "a good full basement and an adequate hot water heating plant, oil fired, and domestic hot water supply" (D43a-34-36), and that the Finkles when "in the second and third floor–they are in another world" (D45a-9-10), his arrival at a $2.80 per square foot figure for 616 and the identical per foot valuation on 618 presents a most incongruous

picture and is out of all reason. The proportionate value of 618, from his own testimony contrasting the relative conditions of the two, is obviously many times greater than that of 616; and the award of the jury, in harmony with Mr. Bradley's praise of the fine condition of 618, is shockingly inadequate; and in view of the unimpeached testimony produced in behalf of the defendants, it is completely without justification.

Furthermore, the per square foot price of $2.80 which Mr. Bradley evidently computed as the sale value of 616 and 618 Perry Street is little more than the $2.23 per square foot gross annual rental that tenants paid on the barber shop and cigar store at 620 and 622 Perry Street.

Mr. Bradley further stated that the subject properties have been put to the highest and best possible use by the defendants for a period 50 or 60 years or more (D46a-33-36).

He admitted that he was not competent to testify as to the cost of construction because he is not a builder (D51a-12-13). Incidentally, plaintiff produced no witness to testify as to construction, quality of the structure, or replacement cost.

It may be appropriate to consider other elements that went to make up the quality of Mr. Bradley's testimony.

On cross-examination Mr. Bradley was asked whether he knew that the 600 block of Perry Street wherein the subject premises were located had been designated blight. His answers were evasive and intended to infer that the block was blighted (D56a-10-24). After much prodding he finally admitted that he did not know officially whether the block on Perry Street from North Clinton to Southard Street was designated blight (D57a-7-8 and 10).

Mr. Bradley was confused throughout much of his testimony.

In answer to a question on direct examination as to whether Mr. Bradley made separate valuations for 616 and 618 Perry Street his answer was "Yes" (D41a-35-36). He was then asked "what was that" (D41a-37). Mr. Bradley gave an elaborate explanation and as a part of his answer testified: "If I were to value it separately, I would simply take about one-half of the value of the land, that I felt it

was worth, and I would put on the building, 616 Perry Street, $7,000, and on the building, 618 Perry Street, $16,500, or a total of $18,650." (D42a-14-17). Could it be that he intended a valuation of the building at 618 Perry Street to be $16,500.00 rather than the figure of $11,650.00 that he later stated to be his valuation? (D43a-3). Furthermore, his estimate of $7,000.00 on the 616 building added to his alleged incorrect estimate of $16,500.00 on the 618 structure he stated amounted to a total of $18,650.00. (D42a-16-17).

Another example of Mr. Bradley's confusion is revealed by the following excerpt from his testimony on redirect examination:

> "Q. How much would he have to arrive at a net income to make this 9%. A. I'm afraid I don't understand.
>
> Q. In other words, you say 9%. What would the net income have to be in order to get this 9% return? A. Well, it would be 9 times my appraised valuation.
>
> The Court: I didn't follow the question nor the answer. Maybe somebody else had difficulty with it.
>
> Q. I asked you, in order to get a 9% capitalization out of this property, what net income would the owner have to derive?
>
> The Court: You will have to start with a figure, will you not?
>
> Q. In other words, here you said you allowed 9% capitalization. A. My answer was that it would be 9 times my total appraisal value of the property; 9 times that would be the net return.
>
> *By the Court*:
>
> Q. Now, just a minute. I don't follow that. Your total valuation is $22,400. You don't mean 9 times that. A. Nine times $22,400 in my head would be something around $2,000 $2200.
>
> Q. You mean dividing 9 into that? A. Yes. Dividing it." (D57a-30 to D58a-16).

In contrast to the testimony of Mr. Bradley, the sole witness offered by the plaintiff, defendant produced five wit-

nesses, included among whom were three experts. The principal witness on behalf of the defendants was Mr. Wilson O. Bachman, a licensed New Jersey real estate broker. An expert of wide experience, whose qualifications were accepted by both the Court and opposing counsel (D119a-16) (D119a-13), Mr. Bachman did not have access to the Coalport files as did Mr. Bradley, who had personally made the appraisal of the 304 to 325 properties in that area (D35a-10-15), (D38a-27). Nevertheless, Mr. Bachman offered as comparable properties: 600 Perry Street, 606 Perry Street, 584 Perry Street, 183-185 Jefferson Street, all of which were in the Coalport area, and 502-10 Perry Street, immediately on the fringe thereof.

Although none of the three properties alleged by Mr. Bradley to be comparable comprised a lot size anywhere near so large as the subject premises, two of the comparables offered by Mr. Bachman were identical in size and in the same block as the subject properties.

Mr. Bachman emphasized the precise comparability of 600 Perry Street to 616 and 618 Perry Street. He stated that 600 Perry Street was identical in size with the subject property and in the same block (D138a-29-30). (D138a-34-35). At the time of the sale of 600 Perry Street to the Housing Authority the lot contained a small cinder block gas station office, and an island with some gasoline pumps and was used as a gasoline station (D138a-35-39). The building "was in a shambles." (D139a-21) He placed no value upon the building nor to the business; yet the Housing Authority paid $30,400.00 for this property. He further testified that that property, identical in size with the subject property, was "by no means as valuable in its entirety as the subject property because it had no buildings of any value on it." (D139a-19-30). No part of Mr. Bachman's testimony concerning the 600 Perry Street property was in any way impeached by cross-examination, nor was any rebuttal whatsoever offered thereto by plaintiff.

Mr. Bachman offered as another very important comparable the property known as 606 Perry Street, which was a short distance from the subject properties and in the same block. The lot dimensions (50 x 95) were identical with the subject premises. It had a three story brick building on it and was purchased by plaintiff in July of 1958 for $51,500.00 (D140a-23-27). Mr. Bachman stated that he examined 606 Perry Street in October of 1958. At that time the building was in deplorable condition, the windows were broken, tenants were still in the property but the testimony was to the effect that the building was in a shambles (D140a-19-22). Although the sale to the Housing Authority was consummated in July, 1958, it was left open by the Court for the defendants to show that the conditions at time of purchase in July were the same as in October of 1958 (D141a-15-19). This connecting link was supplied by both Mr. Maurice Finkle, (D172a-36 to 173a-12) (D174a-39 to 175a-6), and Mr. Nathan Finkle, (D180a-37 to 181a-19), both of whom testified that the condition stated by Mr. Bachman to exist in October of 1958 was the same as July 1958, the time when plaintiff consummated the purchase. Neither Maurice nor Nathan Finkle was cross-examined on this testimony, and no rebuttal testimony was adduced by Plaintiff.

Mr. Bachman further testified regarding 502-10 Perry Street (D125a-30 to 129a-30) which had been sold on December 31, 1956 for $38,750.00 (D129a-10). He testified that the purchaser paid that price solely for the land, inasmuch as the buildings were valueless and a burden to the land, and were demolished shortly thereafter (D126a-5) (D128a-24, 38), and that the expense of the demolition was an additional cost to the purchaser. Its dimensions were 100 x 100 feet (D129a-13).

He also considered No. 584 Perry Street another comparable sale (D141a-20). It was located on the northwest corner of Perry and Southard Street, on the same side of Perry Street as the subject properties, and its Southard Street side directly opposite the No. 600 Perry Street property, supra. His testimony was to the effect that this building was on a lot 24.9 x 78 feet in area (D141a-28);

that it contained a store and some rooms; that it had a pipeless heater servicing only the store and no central heating system (D142a-7-9). The frontage on Perry Street was only one-half that of the subject properties, the depth of the lot only 78 feet, yet the Housing Authority paid $19,000.00 for the property (D141a-36).

Mr. Bachman also considered as a comparable the Galilee Baptist Church property, located at No. 183-185 Jefferson Street. It was on Jefferson Street, one of the poorest in the redevelopment area. The buildings there were "very, very bad" (D142a-14-22). The church building, which manifestly would not have a sale value for ordinary purposes, and was suited only for use as a church edifice, occupied a lot 45.8 feet in frontage x 70 feet in depth (D142a-17), which was a smaller area than the subject premises, which have a combined area of 49.5½ x 95 feet (D42a-8). He further testified that "just before the acquisition by the Housing Authority the church building was in poor condition and the interior, the plaster was off in spots and the building was much in need of repair and maintenance". (D162a-7-11). It should be noted that the photograph of the church, though admitted in evidence (Exhibit P-2), (D183a-5), was taken in 1954 (D216a-7), did not reflect the condition of the property at the time it was purchased by the Housing Authority (D160a-38). This picture was admitted in evidence despite the Court's ruling that defendants' subject properties had to be judged as of the date when the complaint was filed, Sep. 29, 1958, and that they could not be valued as of an earlier date when the project became known and the depreciation and exodus commenced, supra. The price paid for the church property was $105,000.00 (D142a-39).

On cross-examination, Mr. Bachman testified that the subject premises had an estimated net income value of $5,100. per year, representing a 9% return on $55,200.00, (D163a-34-38), which was his estimated market value of the combined subject properties as of the date of the filing of the complaint, September 29, 1958 (D164a-11). He also testified that the store portion would produce a gross yearly rental of $5200.00 (D164a-17) and the apartment at No. 618 a monthly rental of $150.00, a yearly income of $1,800.00 (D164a-26) thus equalling a total gross annual income

of $7,000.00. When taking into account that the open store area of both premises comprised 2968 square feet Mr. Bachman's testimony that this area would produce a gross rent of $5200.00 makes the square foot price $1.75 per year. This figure is considerably less than the $2.23 per square foot yearly rental derived from the barber shop and cigar store at 620-622 Perry Streets, respectively, supra. Referring to 618 Perry Street, Mr. Bachman further testified as follows:

> "618 is a very fine building. The first floor store shows need of decoration, painting to make it more cheerful. The second and third floors of 618 Perry Street are in excellent condition and certainly a very highly desirable and completely acceptable living apartment, in very good shape." (D121a-8-13).

Mr. Bradley's testimony concerning the residence at 618 corroborates that of Mr. Bachman (D44a-3-11).

Mr. Bachman also testified that, in stating his figure of $55,200.00, his price did not reflect any loss of business or loss due to the delay of the Housing Authority in taking possession of the subject properties (D153a-36; 154a-25-29). Incidentally, Mr. Bachman testified that the subject premises were located in an excellent business location in the most densely populated area in the City of Trenton (D125a-10-17). The Court, however, ruled out his statement that delay of the Housing Authority was an element of additional damage which Mr. Bachman did not include in his figure. An appropriate objection to the Court's ruling was noted (D154a-35).

It is respectfully submitted, therefore, that Mr. Bachman's testimony in all respects, was clear and convincing; his permitted comparables were apropos and particularly applicable; his competency was accepted by the Court and opposing counsel; he was not in anywise impeached; and no rebuttal of his testimony was offered by plaintiff.

Mr. William McCarthy was another expert witness offered by the defendants. Plaintiff admitted his qualifications as a construction engineer (D63a-19) and his qualifications as a real estate expert were admitted by the Court (D83a-20-22).

Excerpts from his testimony as to the condition of the subject premises follow:

"Q. Take 616 first. A. 616 was a frame building, and I examined the outside. It has weather boards on. They are not in bad condition except they need paint. The exterior needs paint. In fact, badly needs paint.

"Now, the inside, in the basement which is partly under the store of 616 is a two-foot stone wall, excellent shape; joists in good shape. I saw no evidence of termites, which is one of the first of my examinations, or any other dry rot. The studding, the rafters on the first floor I noticed in the entrance hall there was a slight sag in the floor there caused by a minor weakness in the short partition between the store floor level and the hall floor level which, in my opinion, would be easily rectified. The plastering in 616 was in bad shape, probably have to be done over again." (D84a-1-30 to 85a-1-5).

"And the roof, I found no leaks in it. That was in comparable good condition." (D85a-21-22)

"Now, on 618 I found this building in excellent condition due to the very, very good maintenance. The same kind of wall supporting it."

"Q. What was that constructed of? A. That was two-foot stone, Wilburtha stone. I am very familiar with that. Some of that came out of my father's quarry."

"Q. What was the building in general contructed of? A. Brick, solid brick. The first floor in the store, the floor there was worn somewhat. It possibly should be replaced with another floor on top of it. The walls were all right. All the floor joists were in excellent condition, the studding, interior studding.

"On the second floor–There was some electrical wiring could be replaced in the store. It was obsolete. On the second floor was excellent condition and the st way leading into it was one of the very high-priced rail If we had to do it today, it had a spiral throwout there with a rideout

on it, well, I would hesitate to quote prices. And the floor was parquet oak. Walls and painting and everything else was in excellent condition. Tile bath, very modern, very up-to-date. Also the kitchen. And there was a sleeping porch on the back that was enframed.

"I found no evidence of any roof leaks.

"And, going to the third floor was a similar condition. It was oaks floor. The plaster was good. And I also took a good look at the roof rafters and saw that they were in excellent shape.

"Q. On the stariway from the first floor to the second floor and the hall, what did you observe there? A. Well, there is an elevator there.

> Mr. Kelsey: If your Honor please, I object to any testimony as to the elevator. It is an item of personal property and not attached to the realty.
>
> "The Court: Well, it is not of great consequence.
>
> "Mr. Hartpence: It is part of the equipment of the building, your Honor. There it is.
>
> "The Court: I will allow the question. You found an elevator there?
>
> "The Witness: That is correct, your Honor.
>
> "The Court: A sit-down elevator attached to the banister and goes up the stairs?
>
> "The witness: That is right, your Honor.
>
> "The Court: That answers the question so far."
>
> (D85a-26 to 86a-31).

"Q. What about 618? A. I found that that was in very excellent condition for maintenance.

"Q. It showed evidence of maintenance, did it? Did it show evidence of maintenance? A. It did. Every evidence. A continuous maintenance from year to year.

"Q. What was there that you observed that indicated that continuous maintenance? A. Well, the plumbing, the heating, the painting, the oak floors, the kitchen.

"Q. What about the bedrooms upstairs? A. Yes, I am referring to that. The oak floors in them, the walls, the painting, the continuous maintenance of them.

"Q. What about the outside walls? A. They were in very good condition. There was one wall there, part of the

wall that fronts towards Clinton Street, apparently the demolition of the adjacent building, they marked it up and someone had stuccoed it. It chipped off a piece there, and we looked at the pointing of the building. It was all in excellent shape." (D88a-14-32).

Mr. Matthew DiNola (D112a to D116a), a builder of wide experience, who was also produced by the defendants to show the value of the buildings, but whose testimony was confined to the limits of the Court's ruling (D113a-34) testified as follows with reference to 618 Perry Street:

"Q. What about 618? What did you observe there? What is that constructed of? A. Well, your 618 is 95% masonry which consists of stone foundation, concrete floor, 12 inch brick wall on the first floor, 8 inch brick wall on the second floor with the exception of maybe 15 by 21 on the second floor, the sun porch, but the rest is all masonry, and it is in very excellent condition.

Q. What, with respect to the outside walls, what were their condition? A. The exterior walls, they are in very good condition, with the exception of the skylights which they have on the first floor, and it is about, I'll say about 135 square feet of sky-lights on the first floor which needs repair. Outside of that skylight, I think the building itself, as a contractor and builder, is in very good shape.

Q. What about the plumbing facilities? A. Very good." (D114a-31 to D115a-8).

"Q. Heating apparatus is in the basement of 618? A. Yes. It is in excellent shape. Which, by the way, it is a National Radiator Company, which is a very good boiler. The joists, the floor joists in that are in excellent condition. There is no deterioration on the floor beams or termites eaten.

Q. What about the lighting facilities? A. Well, Mr. Hartpence, the lighting facility is old wire.

Q. Was it electrically supplied or gas? A. It is electrically supplied.

Q. Throughout 618, throughout the whole building? A. Throughout the whole building, yes.

Q. Is that also true of 616? A. Yes.

Q. What about the bathroom facilities in 618? A. Very excellent condition; the tile bath, ceramic tile bath and fixtures.

Q. As far as the general structure itself is concerned, 618, what did you observe and what would you say its condition is, the general building structure? A. In general speaking of the building of construction, as far as I am concerned is in excellent condition structurally, it is from standpoint of masonry or carpentry."

Mr. DiNola also testified that 616 Perry Street required merely minor repairs to restore the building to good condition (D114a-3-30)

The only questions asked of Mr. DiNola on cross-examination were the date of his inspection of the subject premises and the time spent thereon (D116a-30-39).

Nathan N. Finkle, a defendant owner, testified that he resided at 618 Perry Street from the date of his birth until his marriage on January 29, 1950, and knew from his own knowledge that the living quarters were always very substantially maintained (D180a-21-23).

He further testified that he well knew the building known as 606 Perry Street, one of the comparable sales offered by the defendants.

Answering a question as to the condition of 606 as of March, 1958, he testified:

"606, sir, I have been in several times because I knew about this condemnation, and I was quite interested. In March or April of 1958 I was in there again. The general condition was such, first of all, from the outside there were always several windows broken, two or three windows at any time. I went through in spring of 1958—" (D180a-39 to D181a-7).

"Sir, I went through the building and I can give as a general condition that there was—There were a

number of families there. There were people moving in and out. There was garbage strewn in the hallways of the first floor and on the second floor. There were whiskey bottles outside of a couple of doors. That is the condition that I saw in the spring of 1958" (D181a-12 to 18).

He further testified that the condition of 606 was poor. (D181a-26).

There was no cross-examination whatever of Nathan N. Finkle's testimony—nor was any rebuttal offered thereto.

Maurice A. Finkle, one of the owners, testified that he still resided and has resided at 618 Perry Street since his birth in 1900.

Although much stress was placed by plaintiff on the poor condition of the apartment above 616 Perry Street, Mr. Finkle stated:

The "tenant was told to get out by one of the members of the Housing Authority." (D170a-19-21).

"Q. Have you done anything towards maintenance since the last tenant moved out? A. You mean 616?

Q. 616. A. Upstairs, no.

Q. Why not? A. Because we knew that we couldn't get a tenant there under the conditions. The redevelopment was taking place and we couldn't expect a tenant to move in there and expect the tenant to move out soon after." (D171a-11-18).

Thus plaintiff created a situation whereby it was made impossible for defendants to obtain a tenant for the apartment above 616, and a long time thereafter seeks to diminish the value thereof because 616 had not been maintained.

As an owner, Maurice A. Finkle was competent to testify concerning the condition of his own property (*P. R. R. v. Root*, 53 N. J. L. 253).

He testified that 620 and 622 could compare in no way with 618, whether as to size, condition, etc. He stated, without any refutation whatever by plaintiff, that the roof in the rear of 620 was in bad shape and the side wall was bulging. (D172a-21 to 24).

Relative to the condition of 606 Perry Street, one of the comparables offered by defendants, the court asked him to testify generally (D173a-6). Mr. Maurice A. Finkle stated: "I would say very poor condition, generally." (D173a-11).

Mr. Finkle further testified that the business commenced to decline when families started to move away since 1954, and that at the time of hearing the business practically ceased due to the general exodus of more than 400 families (D169a-3 to 6).

He also testified that the bulldozer used in demolition of the adjacent building caused damages to 618 (D175a-19 to 21).

It is respectfully submitted that the testimony of Maurice A. Finkle was in no way impeached on cross examination (D178a and D179a).

Moreover, no rebuttal of any kind was offered by plaintiff to any of the defendants' testimony.

The attention of the Court is respectfully directed to portions of the summation of Plaintiff's counsel which, it is submitted, may have had a misleading effect.

Counsel for Plaintiff read to the jury—"because I want to present to you the facts which I think you deserve to have accurately and as I best recollect them. I have prepared some notes and I will probably do a good deal of reading, and it is only because I want to be accurate that I am doing it in this way, and I hope that you will bear with me." (D196-a-33-38).

In his desire to impress the jury to the effect that Mr. Bradley's valuation of $22,400 was fair and should be their verdict, counsel stated to the jury that his only witness gave the following quoted testimony:

> "Certainly I can justify a $22,400 figure by income because it will bring an investor 9%. $2116 on his property, an income, a net return on this property will not be hard to find. I can justify it and an investor can get it. 9% is reasonable. $22,000 is a reasonable price to get that kind of a return." (D203a-32-37)

It is respectfully submitted that the record no where discloses such testimony by Mr. Bradley. This statement to the jury, therefore, may have had an effect harmful to the defendants.

The governing principdes are clear and well established. The burden of proof is on the plaintiff, and it does not shift.

Hughes v. *Atlantic City & S. R. Co.*, 85 N. J. Law 212; 89 Atl. 769 (E. & A. 1914).

Neibel v. *Winslow*, 88 N. J. Law 191; 95 Atl. 995 (E. & A. 1915).

"Unless circumstances control, when witnesses are equally credible, the greater number must control."

Katzenbach v. *Holt*, 43 N. J. Eq. 536, 12 Atl. 383 (Chy. 1887).

Kentner v. *Kline*, 41 N. J. Eq. 422; 4 Atl. 781 (Chy. 1886).

Blenderhan v. *Price*. 2 Atl. 812 (Chy. 1886).

In *Swanson* v. *Wiesenfeld*, 24 N. J. Super. 576 (App. Div. 1953), the Court said at page 586:

> "While we are not unmindful of the principle that mere numbers of witnesses does not constitute greater weight of the evidence, we also recognize that numerical superiority in qualified expects with competent testimony does aid in establishing one's case by a preponderance of believable testimony. Gorczynski v. Public Service Interstate, etc. Co., 5 N. J. Super. 191, 194 (App. Div. 1949)."

In *N. J. Flax Co.* v. *Mills*, 26 N. J. Law 60 (Sup. Ct. 1856), it was held that,—

> Syl) "The jury are the judges of the weight of evidence, but they have no right to disregard competent evidence that is unimpeached."

And the Court, at page 62, said:

> "The jury might have disbelieved the witness, but they could not lawfully reject the evidence furnished by the receipt. The verdict therefore as rendered cannot stand."

See also,—

Barnes v. *Kinnicut*; 33 N. J. L. 152 (Bergen Dist. Ct. 1909), citing,—
Boylan v. *Meeker*, 28 N. J. Law 476 (1860).
Den v. *Van Cleve*, 5 N. J. Law 589 (1819).
N. J. Flax Co. v. *Mills*, 27 N. J. Law 60 (supra).
Barry v. *P. R. R. Co.*, 65 N. J. Law 407 (1900).
Brown v. *Paterson Paper Co.*, 69 N. J. Law, 474 (1903).

The record shows indisputably that the jury completely disregarded the unimpeached testimony adduced by defendants and rendered a verdict not in accord with the evidence. Such a verdict clearly has no basis to support it nor upon which to stand and is clearly the result of mistake.

Quoting from the case of *Hager* v. *Weber*, 7 N. J. 201 at 210, (1951)

> " 'As respects the appellate corrective process there is no essential difference between a verdict that comes from misdirection and a verdict that constitutes a palpable perversion of the jury function. A verdict that rests upon testimony competent to sustain the inference implied in such a finding is ordinarily conclusive, *e converso*, it is not.' "

It is respectfully submitted that the jury cannot simply set up its own idea of the situation involved and disregard the unimpeached and unequivocal evidence presented. The result is a clear and complete denial of justice, which is also a ground that warrants the setting aside of the verdict,

and a justification for reversing the Court below for denying defendants' application for that relief and a new trial.

POINT II

The Court erred in ruling September 29, 1958, as the effective date for the fixing of value of the subject properties, in refusing to charge defendants request No. 2 (D219a-15-25), and in excluding evidence tending to show that delay by the Housing Authority in filing condemnation proceedings resulted in substantial financial loss to defendants.

Mr. Vincent P. Bradley, the only witness offered on behalf of the Trenton Housing Authority, had been engaged by the said Authority, through its parent company, the Federal Agency, to appraise the Coalport properties (D49a-6).

Mr. Bradley thereupon testified "I appraised for them all of the properties embraced within the lines of the Coalport area where they have been acquiring them. That was in 1954 when I did my first appraising of one-half of all the properties, and then I did the other half, I had not done it before, I had not done before in 1956" (D35a-10-15).

On August 18, 1955, a public hearing was conducted by the Planning Board (D15a-14) and on September 1, 1955, the board of commissioners of the City of Trenton, by resolution No. A3971, designated the so called Coalport area as a blighted area (D15a-20-26).

Thus, as early as 1954, and even prior thereto, the owners of properties in the Coalport area knew generally that this entire area was to be acquired by the plaintiffs for clearance, and certainly by August 18, 1955, the date of the public hearing, all of the property owners knew that this entire section was to be taken. Thereupon, as Mr. Maurice A. Finkle, one of the defendants, testified, "The families have all moved away since '54, started moving away in '54. There were four hundred and some families that had been evacuted." (D169a-4-6).

Mr. Bachman, one of the expert witnesses offered by the defendants testified in response to questions as follows:

"Q. And with relation to this Coalport area and its population, are you in a position to say whether or not this was a good business location? A. In my opinion it was an excellent business location.

Q. And was the area just lately populated or was it more or less densely populated? A. Before the redevelopment project got going, the area immediately north of Perry Street was the most densely populated area in the City of Trenton." (D125a-l 10-17)

Mr. Bachman also testified that his value of $55,200.00 did not reflect any loss of business or loss due to the delay of the Housing Authority in taking possession of the subject premises (D153a l. 36); (D154a l. 25-29). The Court, however, ruled out his statement that delay of the Housing Authority was an element of additional damage which Mr. Bachman did not include in his figure.

"The Court: Now, as to delay, I instruct the jurors they are to disregard any testimony as to delay. We are not concerned with delay here. We are concerned with value." (D154a l. 30-33)

An appropriate objection to the Court's ruling was noted (D154a-35).

In *Grosso* v. *Board of Adjustment of Millburn Twp.*, 137 N. J. Law 630 (Sup. Ct. 1948), where "the pre-existing 'official map' of the Township was 'changed by showing an extension of Essex Street in a general easterly direction from its present terminus through and wholly occupying the lot or parcel of land' in question, 'to afford a traffic by-pass of the intersection of Millburn Avenue and Main Street; * * * which 'placed the entire property * * * in the bed of the proposed street;' " for future use as a public street, Mr. Justice Heher, speaking for the former Supreme Court, said, at page 633-634

"It was plainly not open to the defendant municipality, in the exercise of the planning power, to dedicate the locus to highway uses on the 'official map' and thereby deprive the landowner of all use thereof,

without making compensation, until the municipality was prepared to lay out the street. That would constitute a palpable deprivation of property without due process of law. The amendment of the ordinance does not purport to be the exercise of the power of eminent domain. Rather it is deemed to be a valid regulations under the police power. The Board of Adjustment erroneously concluded that the ordinance served to deprive prosecutor of the use of his land. Such interference with the landowner's exclusive right to the possession, use and enjoyment of his property would infringe the cited constitutional guaranties. This would be a public use for which private property is subject to appropriation only under the power of eminent domain. Private property may not be confiscated under the guise of police regulations."

In the case of *Doremus* v. *City of Paterson, et al*, 73 N. J. Eq. 474 (Chy. 1908), Vice Chancellor Stevens, at page 501 and 502

"In the first place, it is clear that the cause must be regarded as one of appropriation by the city, for public use, of property rights attached to land. * * * It appears from the decisions that there is one rule of compensation in equity and another at law. Both of these rules have been approved by the Court of Errors; the equitable rule in North Hudson Co. v. Booraem, 28 N. J. Eq. 450, and the legal rule in Leeds v. Camden & Atlantic R. R. Co., 53 N. J. Law, 229, 23 Atl. 168. Mr. Justice Reed, in Trimmer v. Railroad Co., 55 N. J. Law, 46, 25 Atl. 932, thus sums up the difference: 'The result of these conflicting rules seems to be that if a corporation, under the conditions mentioned, takes proceedings to condemn lands, the legal rule applies, but, if the question of the value of the land becomes involved in a suit in equity, the equitable rule applies.' The legal rule, which is of purely statutory origin, gives compensation for the value of the land at the time of the award of the commissioners, the equitable rule at the time of the entry."

And, after referring to several cases cited on page 502, among them *Paterson, Newark & New York R. R. Co.* v. *Kamlah*, 47 N. J. Eq. 331, 21 Atl. 954, he said:

"On the Simmons Appeal in this very case, Mr. Justice VanSyckle referred to Paterson & Newark R. R. Co. v. Kamlah, supra, as affording a precedent for the award and ascertainment of damages. It will be observed that in the cases cited compensation not only antedated the filing of the bill, but it antedated the use and enjoyment of the property by the corporation then in possession.

"Now the only difference that can be suggested between the cases referred to and the present is this: That in those cases the company had the right to condemn, and that they entered by consent; while here the city may not have have the right to condemn and it entered (so to speak) without consent. But this rather strengthens the position of complainants. A court of equity, certainly, will not accord a stronger position to a mere wrongdoer than it will to one who enters by permission. It will not declare that he who has no right to take the property of another even on the terms of making compensation, may demand and receive more liberal terms than he who has such right. That the city stands in the attitude of one asking a favor appears from the opinion in the Simmons Case. • • • Simmons v. Paterson, 60 N. J. Eq. 391, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642. • • • The case in hand bears some resemblance to those in which the entry has lawfully preceded the making of compensation. Kough v. Darcey, 11 N. J. Law, 237; Den. v. Morris Canal, 24 N. J. Law, 587; Lehigh Valley R. R. Co. v. McFarlan, 31 N. J. Eq. 706; Id., 43 N. J. Law, 608. In that line of cases the rule of damages is held to be the same as that sanctioned by the Booraem Case. Neither on principle nor on precedent do I find any warrant for the idea that the injury may not and ought not to be regarded by equity as an entirety, to be compensated for as such."

In *Trimmer* v. *Pennsylvania P. & B. R. Co.*, 55 N. J. Law 46 (Sup. Ct. 1892), Mr. Justice Reed, speaking for the former Supreme Court, at page 49 said:

> "In the Booraem Case (North Hudson County R. Co. v. Booraem, 28 N. J. Eq. 450), the award of the commissioners, although made upon an erroneous legal principle, was in conformity with the equitable rule, and so was permitted to stand in place of a report of a master, to whom a reference might have been made, if the question of compensation had not been drawn in a court of equity by the foreclosure of a mortgage covering the land condemned, in addition to other land, the rule adopted by the commissioners in that case would have been inaccurate. The result of these conflicting rules seems to be that if a corporation, under the conditions mentioned, takes proceedings to condemn lands, the legal rule applies; but if the question of the value of the land becomes involved in a suit in equity, the equitable rule applies. So if, under these conditions, the owner brings an action of ejectment to dispossess the company, a court of equity will stay the action upon payment of damages ascertained in conformity with the equitable rule. Trenton Water Co. v. Chambers, 1 Stockt. 471; S. C. 2 Beas. 199."

And in the case of *Appeal of Lakewood Memorial Gardens, Inc.*, 381 Pa. 46, 112 A. 2nd, 135 at 138 (Supreme Court, 1955) the court said:

> "The resolution of condemnation for the original turnpike location was adopted by the Commission on October 10, 1938, and we know of no instance where it was contended that the date of the resolution of condemnation was not also the date of the taking. On the contrary, on three separate occasions we expressly referred to the date of the Commission's 1938 resolution of condemnation as being the time of the taking or appropriation: see Hunter v. McKlveen, 353 Pa. 357, 45 A. 2d 222; Appeal of Pennsylvania Turnpike Commission, 351 Pa. 139, 40 A. 2d 404; and In re

Pennsylvania Turnpike Commission Land Condemnation Case, 347 Pa. 643, 32 A. 2d 910. * * *

"Reasoning from decisions in eminent domain cases arising under other statutes, we think it is both logical and just to conclude that the Commission's formal adoption of the condemnation resolution which set forth the location of the proposed turnpike extension by description and plans, approved by the Governor and the Department of Highways, constituted an appropriation of the indicated properties. In Appeal of City of Philadelphia, 364 Pa. 71, 70 A. 2d 847, the question was as to the effective date of the taking under an ordinance of the City condemning certain land for park purposes. The City later attempted to abandon certain of the described lands. We held that the taking had occurred when the ordinance was enacted and the City could not thereafter abandon the condemnation. In the course of our opinion we said, in 364 Pa. at page 73, 70 A. 2d at page 848,—'The ordinance was no mere authorization to institute proceedings to condemn. It was the condemnation. Cf. Danforth v. United States, 308 U. S. 271, 286, 60 S. C. 231, 84 L. Ed. 240. * * * The ordinance was intended to, and by its own force did, effect the condemnation; the direction respecting the assessment of the damages was but incidental to the principal undertaking of the ordinance: Smedley v. Erwin, 51 Pa. 445, 451.' In Shields v. City of Pittsburg, 201 Pa. 328, 331, 50 A. 820, 821, it was held that where a city has by ordinance appropriated land for park purposes but does not actually enter thereon until later, the date of the taking, after there is an actual entry, relates back to the date of the ordinance. The Shields case cited Witman v. City of Reading, 191 Pa. 134, 143, 43 A. 140, and approvingly quoted therefrom as follows: '"By actual opening of and construction of the street, the date of taking relates back to the date of the ordinance adopting the route. This ordinance warned plaintiffs to stop their improvement. The construction of the street was the consummation of the purpose manifested by the

constructive appropriation.'' Again, in Jury v. Wiest, 326 Pa. 554, 193 A. 5, the date of a school board's resolution condemning certain property was the date of the appropriation. It was there recognized that it was not necessary for the school directors to take physical possession of the land in order to effectuate the condemnation.''

Although plaintiff claims that September 29, 1958, was to be the date as of fixing of value of the subject premises it is worthy of note that even prior thereto the tenant at 616 Perry Street, part of the subject premises, was told by a member of the Housing Authority to move out (D170a l-19). Hence, action by the Housing Authority was further evidence of interference with defendants' rightful proprietary rights prior to the institution of the condemnation suit, and for that reason, naturally, no further repairs would be made to 616 Perry Street. It was thus manifestly unjust to defendants when the jury was required by the Court to fix value as of September 29, 1958 instead of the earlier date; and, in fact the jury was afforded no view until June 25, 1959.

The Housing Authority, by its action in thus laying waste the entire area, created a situation tremendously disadvantageous to the physical appearance and superior location of the premises involved, as of the date of filing its complaints, September 29, 1958, which it insists is the date as of which the value must be determined (D28a-1-9) instead of 1954 (D30a-l-29) when the inevitable demolition and evacuation of the area became an inexorable eventuality. The position of the Housing Authority was sustained by the Court's rulings (D90a l 31, 38) (D207a l-7) (D210a-l-10). To those rulings defendants noted appropriate objections (D215a l-8) (D219a l-6-25), contending that the value of the properties must be determined as of the time when the governmental authorities first made known their intent to invade and destroy the area, which led to its evacuation and depreciation of values, and not after four years of waiting, while the demolition, destruction, devastation, and exodus progressed, and thus, by its own action and non-action, claim ''profit by its own wrong,'' in contravention

of the universal fundamental principle which holds that such cannot be.

Negotiations by plaintiff commenced in 1955 and actually acquisition of properties had already taken place during the early part of 1956.

It is respectfully urged, therefore, that defendants suffered irreparable harm due to the unwarranted delay of plaintiff in failing to institute condemnation proceedings of the subject premises until more than 2 years after definite acquisition of the properties in the area had commenced. Indeed, the families started moving away as early as 1954 (D169a 1 4-6). Inspections and appraisals of one-half of the entire area were made by Mr. Bradley, an employee of the plaintiff in 1954, (D49a 6-7)(D35a 1-12)(D50a 1 8-9). The subject premises were inspected and appraised by Mr. Bradley in 1954 (D43a 1-14) (D48a 1-25).

As a matter of fact, at the time of the filing of the complaint (September 29, 1958) almost all the properties in the area had been demolished, leaving but little more than vacant land. What is more, the jury did not view the subject premises until June 25, 1959, the date of the hearing, a period of 9 months after the commencement of the suit, when almost the entire area was devastated.

Manifestly, the subject properties did not present the same picture on September 29, 1958 (the date of the filing of the complaint), nor on June 25, 1959, the date of the jury view, as they would have presented had they been examined, appraised and viewed when the area was in its normal full business activity.

Inasmuch as the view of the jury took place 9 months after the filing of the condemnation suit and also after adjoining properties had been demolished and the entire area virtually laid waste, it is respectfully submitted that the jury may have reasonably been misled by the remarks of plaintiff's counsel in summation, as follows:

> "You have viewed the property. You and I have viewed the property. You are at liberty, lady and gentlemen, to use your recollection of that view to

determine what you feel those properties are worth. You can use it to modify, I guess you could go almost so far as to say extinguish the views of the experts at their fifty-fives and sixty-eights. You can use it if you think it is necessary, although I think we are just about right, to push up Mr. Bradley's figure. But whatever you want to do, you can use it in judging what you feel to be the true market value of these properties. And, of course, the ultimate decision rests with you." (D204a l 20-30).

It is respectfully submitted, therefore, that the Court erred in excluding the evidence and in refusing to charge the jury as stated.

POINT III

The Court erred in refusing to permit defendants' witnesses to testify separately with regard to building value and land value of the subject premises, especially in view of the testimony of plaintiff's only witness in using building value as a basis of his over-all opinion of value?

In answer to a question on direct examination as to whether Mr. Bradley made separate valuations for 616 and 618 Perry Street his answer was "Yes" (D41a-35-36). He was then asked "what was that" (D41a-37). Mr. Bradley gave an elaborate explanation and as a part of his answer testified: "If I were to value it separately, I would simply take about one-half of the value of the land, that I felt it was worth, and I would put on the building, 616 Perry Street, $7,000, and on the building, 618 Perry Street, $16,500, or a total of $18,650" (D42a-14-17). Could it be that he intended a valuation of the building at 618 Perry Street to be $16,500.00 rather than the figure of $11,650.00 that he later stated to be his valuation? (D43a-3). Furthermore, his estimate of $7,000.00 on the 616 building added to his alleged incorrect estimate of $16,500.00 on the 618 structure he stated amounted to a total of $18,650.00 (D42a-16-17).

On behalf of the defendants, Mr. William McCarthy sought, in refutation of Mr. Bradley's testimony, and also to sustain his own ultimate opinion of value, to show his valuation of the buildings on Nos. 616 and 618 Perry Street, the subject properties. But, by the Court's ruling he was not permitted to show such value, and was confined to testimony solely as to the market value of the properties as between a willing seller and a willing buyer. He was not permitted to show the bases upon which he reached that opinion.

Quoting from Wigmore on Evidence 3rd Edition Vol. 2 Sec. 562 page 644, Sec. 655 page 759:

> "§ 562. * * * An expert witness, like any other witness, may be asked on the direct examination, or may be required, to state the *grounds of his opinion, i.e.* the general data which form the basis of his judgment upon the specific data observed by him. This is merely an application of the general principle of the knowledge-qualification (*post*, § 655)."
>
> "§ 655. * * * The party offering a witness may desire to make plain the strength of the witness' grounds of knowledge and the reasons for trusting his belief. This is a legitimate purpose. * * * "

However, Mr. Bradley had based his opinion of value exclusively, except for the alleged comparables noted, upon the value of the buildings, plus an increment or enhancement flowing from a hypothetical sale of the combined properties as a single unit rather than separately (D50a-38, D51a-3); notwithstanding his admission of lack of qualifications regarding construction (D51a-10). Upon the ruling by the Court, a motion was made to strike Mr. Bradley's testimony of value based upon the building estimates, but that motion was denied. Appropriate objection was noted (D71a-34) supra. As it stands, therefore, Mr. Bradley's valuations are permitted to stand upon a basis of separate value of the buildings, with an enhancement by a hypothetical sale as one unit; while Mr. McCarthey's proposed testimony upon the basis of separate value of the buildings as an element in forming his opinion of the overall value, is excluded.

That defendants' counsel did not object when plaintiff's witness, Mr. Bradley, used the method of separate valuation of buildings and land (D42a-15-18) and then the overall final estimate of value, is due to the fact that he used the accepted method in reaching his conclusion of value. Later, however, when the same method was sought to be availed of by defendant (D70a-25-28), plaintiff objected that it (his own method) was improper, the Court sustained his objection, and defendants were precluded from following it. Then it was that the objection to plaintiff's improper use of the method first became an open question (D74a-15-17) and defendants promptly availed themselves of their first opportunity to so object to Bradley's testimony, and moved to strike it (D71a-19-21)(D71a-27-29) deeming it objectionable when offered by plaintiff if objectionable when offered by defendants. The Court, however, refused to strike plaintiff's testimony (D71a-30; D71a-33) though ruled improper as to defendants, and excluded defendants' precisely similar testimony as improper. And now, plaintiff's counsel assert that Bradley's testimony as to the value of the buildings (though ruled to be erroneous and illegal when offered by defendants) should stand, but that defendants' precisely similar testimony (though unquestionably correct and legal) should be excluded.

And it should be noted that if this evidence of Mr. Bradley were to be also stricken as improper and illegal, there is virtually no evidence in the case to sustain plaintiff's claim of value.

Mr. DiNola's testimony was also confined to the limits of the Court's rulings aforesaid (D113a-30-34).

It is respectfully submitted, therefore, that the Court erred in thus ruling, and the authorities to that effect are numerous and are set forth as follows:

> "Whatever a plaintiff may prove, the defendant may disprove."
> *Hill* v. *Carter*, 16 N. J. Law 87 (Sup. Ct. 1837).

In *Stein* v. *Schmitz*, 137 N. J. Law 725 (E. & A. 1948), where one of the rulings complained of was the admission

of hearsay evidence, Mr. Justice Bodine, speaking for the Court of Errors and Appeals, at page 726 said:

> "To establish this defense, it was necessary for the attorney to testify to the facts related to him by his client. The evidence complained of was introduced for that purpose.
>
> "It was said by Mr. Justice Case in Rynar v. Lincoln Transit Co., Inc., 129 N. J. L. 525, 528, 30 A. 2d 406, 409: 'If the evidence is legal for one purpose but incompetent for another, it will be admitted and the party disadvantageously affected may summon the court's assistance by request to charge or other appropriate means. Perry v. Levy, 87 N. J. L. 670, 94 A. 569.'
>
> "Plaintiff having opened the door on his direct examination and having cross examined on the same line of questioning, there was no error in the admission of the evidence."

Where defendant opened the door and submitted expert testimony of the meaning of words in a written contract, evidence of the same character was made admissible by the plaintiff.

> *Jenness* v. *Simpson*, 84 Vt. 127; 78 Atl. 886 (Sup. Ct. 1911).
>
> "* * * The testimony offered by the defendant was not admissible. * * * If the evidence offered by the defendant was admissible, it was certainly open to the plaintiff to contradict it. * * * It was offered to affect and contradict the testimony on the part of the defendant. There is no error." * * *

> *Budd* v. *Meriden Elec. Co.*, 69 Conn. 272; 37 Atl. 686, 686 (Sup. Ct. 1897).
>
> "If the irrelevant testimony is offered by one party, the other side should object to it; and if it be given before its irrelevancy is apparent, the court should strike it out on proper application."

> *Lake Roland El. Ry. Co.* v. *Weir*, 86 Md. 273; 37 Atl. 714, 716 (Ct. Ap. 1897).

(Syl.) "Where defendant testifies as to the contents of a letter not produced, plaintiff may give evidence in rebuttal as to her version of it."

Orr v. *Clark*, 62 Vt. 136; 19 Atl. 929, 930 (Sup. Ct. 1890).

"If the admission of this testimony was an attempt to read into the contract something that was not there, as contended by the attorney for the plaintiff, it was allowed at the asking of the plaintiff."

(Syl.) "A plaintiff who has introduced parol testimony to show that the language of a written contract should be given a particular construction cannot complain of the admission of similar testimony on behalf of the defendant."

Vermont Farm-Mach. Co. v. *Batchelder*, 68 Vt. 430; 35 Atl. 378, at 381 (Sup. Ct. 1896).

"A party who brings out matters on cross-examination not competent in chief cannot object to inquiries touching those matters propounded to the witness on redirect examination."

McElheny v. *Pittsburgh & C. Ry. Co.*, 147 Pa. St. 1; 23 Atl. 392 (Sup. Ct. 1892).

"In what we have said we do not wish to be considered as having any reference to a case where incompetent evidence has been admitted on one side which may injuriously affect the opposite party. It was decided in Milburn v. State, 1 Md. 14, that under such circumstances it was competent to contradict it."

Gorsuch v. *Rutledge*, 70 Md. 272; 17 Atl. 76 (Ct. Ap. 1889).

"Where because of view, jury might have been misled as to true picture of stairway at time of plaintiff's fall if in fact a change had since been made, plaintiff was entitled to give testimony to show state of stairway as she claimed it existed when she fell."

Panagoulis v. *Philip Morris Co.*, — N. H. —, 68 Atl. 2, 672 (Sup. Ct. 1949).

Where a plaintiff offered parol evidence of the contents of a written document upon which he relied, which was received, and there was a reasonable probability that the document could be produced if appropriate steps were taken, it was held that,—

> "If he does not do this, the burden being upon him to account for the non-production of other of the bills, he cannot object to the defendant's use of parol testimony to rebut the same kind of evidence adduced by himself."

Dyer v. *Fredericks*, 63 Me. 173 (Sup. Jud. Ct. 1874).

And in *Hatch* v. *Brown*, 63 Me. 410, at 418, (Sup. Jud. Ct. 1874), the Court said:

> "One of the questions to be settled between the parties was whether there was any force and effect in the conveyances of the Mayberrys to this defendant by reason of a pre-existing but lost deed from Willard, the original owner, to Jane Mayberry. It was remote and secondary proof that the defendant relied upon to support his hypothesis. It was competent to meet it by proof of circumstances which tended to counteract the inferences that otherwise might be drawn from such testimony as the defendant produced."

In *Morrell* v. *Preiskell*, 74 Atl. 994, at 995 (Sup. Ct. 1909), the Court said:

> "• • •
>
> "The defendant called as a witness Thomas McMahon, one of the members of the board of tax assessors of the city of Passaic, for the purposes of proving the value of the premises. He expressed the opinion that they were worth $10,000. He was then asked how he arrived at that value, and he stated that he did so by ascertaining the value of the land and of the building, and was about to give his opinion as to the value of each when he was interrupted by counsel for the plaintiff, and the court refused to permit

him to testify upon this point. This ruling of the court was also made the subject of exception, and is assigned for error. We think the testimony was wrongly excluded. Not only is it, as a general rule, proper to permit an expert testifying to the value of improved property to state how he makes up his valuation, but on the present case it was particularly important that the jury should know how much of the value which existed in the property was attributable to the land, and how much to the building, in determining the extent of the depreciation in the value of the whole property caused by the presence of the sewer. For this reason also the judgment under review should be reversed."

The case of *Goodman* v. *L. V. R. R. Co.*, 82 N. J. Law 450, aff. 82 N. J. L. 527 (E. & A. 1911), is also particularly applicable. There it is stated by the Court of Errors and Appeals that:

"The evidence as to cost of farm buildings was clearly admissible on the question of damages. Of course, the cost was not the measure of damages, but such cost is a fact to be considered in ascertaining the fair value of the buildings at the time of the fire and from that the depreciation in value of the farm by reason of the fire."

This clearly supports the rule enunciated by the Supreme Court in *Morrell* v. *Preiskel, supra.*

POINT IV

The Court erred in barring defendants' offer of testimony as to replacement cost less depreciation.

Mr. Bradley testified on direct examination that one of the recognized methods to ascertain value of a property is replacement less depreciation of the improvements (D42a-22). Mr. Bradley further testified that "the Finkle store was the only store of any size in the block. This was the only store of its type." (D44a-25-27) In effect, plaintiff admitted that the subject property was unique in the entire area. Of the more than 300 properties appraised by Mr.

Bradley, the 3 units offered by him could be compared in no way with the subject premises. It would appear, therefore, that the recognized method of ascertaining value—namely, replacement cost less depreciation, was a proper one to adopt.

Defendants called Mr. McCarthy, a construction engineer of many years standing, to offer testimony as to the reproduction cost less depreciation relative to the subject properties. It might be stated here that defendants did not intend to offer original construction cost.

The Court at first indicated that, although it was improper to use original cost as a test of value inasmuch as the buildings were too old (D74a-18, D74a-28 to 31), still he inferred that it might be proper to place a value upon reproduction cost less depreciation (D75a-34 to D76a-5, D78a-18, 19). Later, however, when such testimony was proffered, the Court ruled it inadmissible, and Mr. McCarthy was limited to a description of the condition of the buildings, and the fair market value of the properties. To the restriction placed upon his testimony by the Court, appropriate objection was noted. (D74a-36).

POINT V

The Court erred in limiting the finding of the award by the jury to the price as between a willing buyer and a willing seller as of September 29, 1958.

It is respectfully submitted that the price that might be agreed upon between a willing buyer and a willing seller as of September 29, 1958 was damaging to the defendants' cause and is inapplicable in this situation. The willing buyer and seller rule referred to by plaintiff should not be the test when the value thereby fixed is as of the date of the filing of the Complaint, when the property has been subject to seizure for a long period in advance and the surrounding area had become almost entirely devastated.

POINT VI

The Court erred in refusing to admit testimony by defendants witness, Mr. Bachman, respecting certain comparable properties.

Mr. Bachman offered to testify that No. 5 Pennington Avenue, No. 2 Spring Street and Nos. 565-569 North Clinton Avenue were also proper comparables and was prepared to give testimony in support thereof (D135a-10-15). He further stated that the general character of the neighborhoods were similar as to racial makeup, character of buildings, type of residences and felt that they were comparable in every way (D131a-10-23). The Court ruled, however, that testimony on these properties would not be permitted, pursuant to his discretionary power, in that these properties were not in the immediate vicinity (D137a-7-13).

It is respectfully submitted that the witness should have been permitted to refer to them and to show why he felt they were comparable, and if it should then transpire that they lacked force, the jury could have been appropriately instructed accordingly. Objection to the Court's ruling was duly noted (D137a-14-16).

POINT VII

The Court erred in refusing to grant defendants' request to charge #1, as follows:

> "In taking the properties involved in this proceeding when the properties are taken, the owners are entitled to recover and be paid for the property actually taken and for all damages, present and prospective, which may be known or reasonably expected to result from the improvement, whether they be the income from the buildings used for mercantile and dwelling purposes or the private business of the owners." (D29a-5-13).

This instruction to charge was taken verbatim from the case of *Lenzner* vs. *City of Trenton*, 22 N. J. Super. 415.

The testimony of Mr. Maurice A. Finkle showed the nature of the business conducted in the subject premises and the effect upon it by the action of the Housing project.

The pertinent testimony follows:

The Court: Well, now, gentlemen, I think we have had enough background. I think we should concentrate on the two or three-year period before the actual taking.

Mr. Hartpence: That is what I anticipated he would state.

Q. Up to what time? A. Well, it started to drop around '53.

Q. About when? A. '53, just before – At the end of '53, it started to drop, the business started to drop in volume.

(251) Q. And from '53 on, what has been its condition? A. Well, it has been a gradual decline until now it is practically nothing. The families have all moved away since '54, started moving away in '54. There were four hundred and some families there that had been evacuated.

Q. And to what did you attribute this falling off of the business?

Mr. Kelsey: It is speculative, your Honor.

A. The fact that there are no families around there any more.

The Court: Just a second. You object?

Mr. Kelsey: I object to it being speculative, your Honor. We are getting into a tremendous amount of extraneous issues.

The Court: I assume we are not going to be very long.

Mr. Hartpence: Very brief. I am trying to make the questions just as few as possible.

The Court: This witness said in prior testimony that some 400 families left the area starting in '54, and that the business has been declining. Now, do we need anything (252) further?

Q. Can you state what caused those families to leave?

Mr. Kelsey: Your Honor, that is the same question.

The Court: Well, we all know that the Coalport area exists here and there was an evacuation and a demolition of the buildings. We don't have to have that from this witness, do we?

Mr. Hartpence: All right, sir. So long as the record shows it.

The Court: We all looked at the premises. (D168a-30 to D169a-32).

It is, therefore, respectfully submitted that the Court's refusal to charge request No 1 was prejudicial to defendants' rights. (D214a-38).

POINT VIII

The Court erred in refusing to permit Maurice A. Finkle, one of the defendants, to testify to the cost of moving.

Taking into consideration the extent of the store or business use of defendants property and the obvious and palpable expense which the moving of the contents would involve, defendants should be allowed reimbursement by plaintiff's taking of the property and the consequent eviction of defendants by reason thereof was the proximate cause of the moving expense. *U. S.* v. *Genl. Motors*, 323 U. S. 373 (1944).

[262] Q. Now, Mr. Finkle, by the taking of these properties 616 and 618 Perry Street, you will be obliged to move, will you not? A. Yes.

Q. Obliged to move the stock in the store and dispose of it? A. Be obliged to dispose of it.

Q. And are you in a position to state what the expense will be to you of the moving and the disposal?

The Court: That will be speculative. How can he do that?

Mr. Hartpence: I am asking him if he is able to make an estimate of what that cost will be.

A. Well, I know how much—

The Court: Just a minute.

The Witness: I'm sorry.

The Court: That would require expert testimony

Mr. Hartpence: Oh, I don't think so, your Honor. I think he can state if he is in a position to estimate what the cost would be to move. He should be entitled to the cost of moving.

The Court: Do you have some law on that, [263] sir?

Mr. Hartpence: United States against the General Motors Company. I gave the citation to your Honor.

Mr. Kelsey: If your Honor please, I have a citation to the contrary, Cook v. the City of New York, New Jersey citation, 133 Atlantic.

The Court: Well, now, gentlemen, this is speculative. We are getting into the realm of speculation. I don't know and I don't think it is proper for this jury to know whether or not this store is going to be moved to another location, operated under the same management, or sold, and to what extent, and abandoned, and as to what extent. I think we are not interested in that. We have testimony here that there was a business establishment on the premises that operated. It operated for a great number of years. The opportunity to continue to operate is gone as a result of this taking. The jurors know that. Now, that is a factor to the extent that they want to consider it so in their over-all determination. I don't think we want anything further.

Mr. Hartpence: I desire to show by the [264] witness what reasonably it would cost to move from the premises and to depart after the Housing Authority had taken possession.

The Court: I will not allow it.

Mr. Hartpence: And I pray exception, and desire to note the objection on the record.

The Court: Yes. (D175a-24 to D176a-32).

As an owner, Maurice A. Finkle was competent to testify concerning the condition of his own property (*P. R. R.* v. *Root*, 53 N. J. L. 253).

In the *U. S.* v. *General Motors Corp.* case, *supra*, Mr. Justice Roberts, speaking for the United States Supreme Court, at page 383, said:

> "Some of the elements which would, certainly and directly affect the market price agreed upon by the tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials and transportation. And it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long term lease. The respondent offered detailed proof of amounts actually and necessarily paid for these purposes. We think that the proof should have been received for the purpose and with the limitation indicated."

Citing—in foot note—

Patterson v. *Boston*, 23 Pick (Mass.) 425; *Getz* v. *P. & R. R. Co.*, 105 Pa. 547; *P. & R. R. Co.* v. *Getz*, 113 Pa. 214, 6 A. 356; *McMillin Printing Co.* v. *Pittsburgh, C. & W. R. Co.*, 216 Pa. 504, 65 A. 1091; *North Coast R. Co.* v. *Kraft Co.*, 63 *Wash.* 250, 115 P. 97; *Natl. Laboratory & c. Co.* v. *U. S.* 275 Fed 218.

And in the case of *North Coast R. Co.* v. *A. A. Kraft Co.*, 63 Wash. 250, 115 Pac. 97 (Sup. Ct. 1911), at page 101, 102, cited by Mr. Justice Roberts in the *General Motors* case, *supra*, the Supreme Court of Washington stated:

> " 'Injury to business, loss of profits, inconvenience to the owner, damages to personal property, or the expense of removing it are not to be estimated as distinct elements of damages.' • • • We think the evidence was admissible, not as a basis for a specific claim, but as showing the value of the unexpired term. • • • These cases support the contention that such losses are recoverable." • • •

> "'Damages', in law, means an adequate compensation for the loss suffered or the injury sustained. The rule itself is well settled and simple of statement, but its application is often attended with difficulty, on account of the great diversity of circumstances surrounding different cases where the principle is sought to be applied. As was said in Seattle, etc. Ry. Co. v. Scheike, 3 Wash. 625, 29 Pac. 88 '* * * It is difficult, if not impossible, to lay down a rule of universal application as to what may be considered as elements of damage, as the equities of the parties must more or less depend upon the particular facts and circumstances of each case.' This is particularly true as applied to a leasehold which may have no market value in excess of the rent reserved. The appellant is entitled to be paid the value of the unexpired term. The items under consideration are but constituent elements of that value. In principle and according to what we consider the better authority, they are not recoverable as something apart from the leasehold interest. They form an essential part of its value."

The case of *State* v. *Hudson Circle Service Center, Inc.*, 46 N. J. Super. 125 (App Div. 1957), is in complete accord with the principle enunciated in the two preceding cases.

In that case Judge Price, speaking for the Appellate Division, at page 134 said:

> "In the case at bar a jury has the right and duty to "weigh all the factors.' We believe this should include the consideration of the proffered evidence of the amount of gallonage delivered and the claimed difference between the rent reserved and the claimed greater value of the lease. In that connection the jury should have had the opportunity to consider evidence involving the capitalization of the rental for which conditional provision was made under the lease, and also involving capitalization of rental which it is claimed would result from the higher rental that such stations on a gallonage basis would command in the open market.

"Under these circumstances we determine that the rigid confinement of the proofs by the learned trial court to the rental fixed by the lease was erroneous and, as it went to the heart of the question of valuation, it was substantial."

As stated in the case of *New Jersey Highway Authority* v. *Rudd, supra,* 36 N. J. Super., at page 5, 114 A2d at page 723:

"In the consideration of appeals our study of the record is dedicated to the ascertainment whether to deny a reversal of the judgment under review for the trial error would be inconsistent with substantial justice and prejudicial to the substantial rights of the appellant. R. R. 1:5-3; 2:5.

"For the reasons above set forth, the judgment under appeal is set aside and a new trial of the issue is ordered."

POINT IX

The Court erred in refusing to permit Maurice A. Finkle, one of the defendants, to show expenditures for maintenance.

Maurice Finkle, who had lived in No. 618 all his life, should have been permitted to show the cost of maintenance of the property over the years. The testimony is replete with references to the fine condition of that property, and the purpose of showing what had been spent in its upkeep was to demonstrate and buttress that fine condition, not for the purpose of claiming specific reimbursement for the expenditures. It was clearly relevant and competent.

This principle is illustrated also in the cases of *U. S.* v. *General Motors* and the *North Coast R. Co.* v. *Kraft Co. supra.*

The trial Court, however, would not permit the evidence to be introduced.

> "Q. Can you state approximately how much was spent by way of maintenance of those buildings, 616 and 618 Perry Street during the past years that you referred to when maintenance improvements were made?
>
> Mr. Kelsey: I must object to that question as being too broad. How far back are we going? What years are we encompassing? Furthermore, what is the materiality of it, if he does so state.
>
> The Court: We have had testimony from experts here that this apartment was somewhat extraordinary and maintained in very fine condition, and I suspect the jurors have heard all of that, and that is an element that they should consider.
>
> Now, the cost of it, the time, the depreciation and that I don't think we need here.
>
> [265] Mr. Hartpence: I thought it might have a bearing to show just how much was spent.
>
> The Court: I think what we are concerned with is the value of the properties as of September, 1958. That is what we are concerned with.

Mr. Hartpence: And the things that concerns me is the cost of improvements on those buildings might be equal to what the Housing Authortiy now wants to pay for them.

The Court: Well, we are not concerned with what the Housing Authority wants to pay. We are concerned with what these jurors find to be the value of both these properties as of September of '58. That is what we are concerned with.

Mr. Hartpence: The value of those properties depends considerably upon their condition.

The Court: We have had a lot of testimony as to the condition, I agree.

Mr. Hartpence: And I think what was spent by way of maintenance by the owner or those in possession during the past few years would be appropriate to indicate how well they were kept in condition.

[266] The Court: I disagree with you, sir, and you have an exception on the record." (D176a-34 to D177a-33).

POINT X

The Court erred in refusing to permit Maurice A. Finkle, one of the defendants, to testify as to negotiations and an agreement with the representatives of the Housing Authority respecting the acquisition of the subject properties.

Testimony was offered by the defendants to show that an agreement had been reached by the Housing Authority and the defendants and the price offered and accepted. Plantiff's counsel objected to the introduction of this testimony and the objection was sustained.

By Mr. Hartpence:

Q. Were you approached with regard to the acquisition of the property 616 and 618 Perry Street by representatives of the Housing Authority? A. Two negotiators, one for each property. They had one negotiator for 616 and one for 618.

Q. When did they come to you about that? A. Well, they started in '58.

Q. And no agreement was reached between you?

Mr. Kelsey: That is obvious, your Honor.

The Court: Yes.

Mr. Hartpence: I am sorry. I am not permitted to ask a question before I am interrupted.

Q. No agreement was reached between you and those negotiators with regard to a price to be paid for the property?

Mr. Kelsey: I object to the question. Mr. Hartpence may say I don't give him permission to ask questions but I sat here listening to a lot of immaterial—

[259] The Court: What is your objection?

Mr. Kelsey: It is immaterial whether they reached an agreement or didn't reach an agreement. Obviously, we wouldn't be here if they reached an agreement.

The Court: I sustain the objection.

Mr. Hartpence: I ask my objection be noted to your Honor's ruling." (D173a-13 to end)

Defendants had a clear right to disclose what took place between them and the Housing Authority and to show what had once been agreed upon between them, but from which the plaintiff had withdrawn, after the settlement papers had been submitted to defendants for signature. No objection to those proceedings was made by plaintiff as being without prejudice, and they were clearly admissible as an admitted indication of value.

POINT XI

(Not Presented Below)

The Court erred in charging the jury respecting the significance of their view of the premises.

An excerpt from the Court's charge to the jury follows:

> "You have had an opportunity to view the premises. You may make use of that view of the premises in forming your judgment of the testimony and in reaching an opinion upon its consideration. Your opinion upon questions you are to decide should be based upon the testimony as thus understood by you and applied to what you have seen. It may well be that (331) your judgment of the testimony may in some cases be modified, and in extreme instances perhaps be controlled as a result of your view of the premises. It may well follow as to some testimony, that to understand it in the light of your view is to discredit it, while as to other testimony, to so understand it is to accept it, even in the face of contradiction and denial." (D212a-15-27).

It must be borne in mind, however, that this view by the jury did not take place until June 25, 1959.

The effect of the view by the jury is of little weight, if it can be considered at all. It is merely informative, and certainly could have no adverse bearing when made four years after the depletion became a certainty, three years after acquisition commenced, and nine months after the filing of the Complaint. The negative effect of the view is determined in *Garland* v. *Furst Store,* 93 N. J. Law, 127; 107 Atl. 38 (E. & A. 1919), as illustrated by the appropriate excerpts from the opinion of the Court of Errors and Appeals as follows:

> "But the defendant respondent contends that, as there was a jury of view, the observations of the jurymen are evidence in the case, and, as a court of

appeal cannot know what they saw, the verdict may not be set aside. * * * (But)

"* * * to avail a party of a fact known to a juror he must be sworn and examined as any other witness, * * * and for the further reason that the court and parties may know upon what evidence the verdict was rendered. * * *

"In our opinion the question presented to a court of review should be decided upon what appears in the record brought up to the appellate tribunal, notwithstanding that a view was had by the jury."

Although this point was not specifically presented in the court below, it is respectfully submitted that it comes within the plain error rules, R. R. 1:5-3(c).

It is obvious, therefore, in summation, that the prime issue involved is the fair value of that which is taken from the owners and appropriated by the Housing Authority, in the exercise of its asserted power of eminent domain by virtue of the Legislative authorization under which it functions. In the exercise of that power it is bound, as is every branch of State action, from the highest to the lowest, by the exactions of the Federal and the State constitutions, and the Law of the Land, protecting the citizen in the possession, use and enjoyment of his property against invasion by the State. And in the exercise of that power of eminent domain, those constitutional safeguards demand that the owner whose property rights are thus invaded shall be justly compensated for what is taken from him, that "he shall be no poorer after the taking than he was before," and that the sovereign power in exercising that power shall be strictly and indeviably governed and controlled by those constitutional exactions of Due Process of Law, the Equal Protection of the Laws, and the Law of the Land.

In determining the fair value of what is thus taken various elements are considered, the value of the land, the value of the structures thereon, the damage to the remainder, if any, the treasure that may be buried beneath the surface, the income that may be derived from the use thereof, the location, the nature and desirability of the surrounding or adjacent neighborhood, and the desire and

wish of the owner to remain in the possession, use and enjoyment thereof. Other elements may enter in under special circumstances. And in determining that value, they who are vested with the function of fixing it ordinarily view the property, hear the testimony that may be produced bearing upon it, receive the instructions of the tribunal regarding the applicable law governing the situation, and then, after due deliberation, render their award.

The testimony adduced, except as to general surrounding conditions, is that of witnesses who are qualified as experts to give their opinion as to value, and they who are to make the award are bound by the evidence thus adduced, the same as in all civil actions. They cannot lightly lay that evidence aside, or disregard it, and award a compensation they may choose to determine, which has no legal basis to support it. It must find a justification in the evidence.

In the present instance the usual course was followed. The jury viewed the property involved; various witnesses testified regarding the value; the Court instructed the jury respecting the applicable law; and the jury rendered its verdict awarding the sum of $26,000.00 to the owners. Certain exceptions were taken to the Court's rulings and the Court's charge to the jury in the course of the trial. The owners took action to overthrow the jury's award and to obtain a new trial, but their motion to this effect was denied by the Court, and appropriate objection to the denial was noted on the record. From the final judgment thus entered the present appeal to this Court was taken by the owners.

The only witness produced by the Housing Authority in behalf of the value they claimed should be fixed for the property taken was Vincent P. Bradley, a real estate broker of long experience, and who had been retained by the Federal and State agencies interested in the housing project to appraise the entire tract involved, and who had commenced his appraisals in 1954, at which time it became known to

the community that the entire so-called Coalport area, shown by the Exhibit P-1, was to be cleared and the buildings demolished. From that time on the exodus of population continued, about 400 families moved out, repairs ceased, and tenancies and business waned and disappeared, and at the time the Housing Authority filed its Complaint in this action, on September 29, 1958, only a few buildings remained, among them the two here involved, No. 616 and No. 618 Perry Street. No recent repairs had been made to No. 616, but No. 618, in which one of the owners had his living apartments, was in excellent condition. Both had communicating dry goods and merchandise stores on the first floor, and that business had been carried on there by the family of the present owners for many years. There was no other available location in the area for the continuation of the business. Most of it had departed with the evacuation of the area. Perry Street, however, was one of the main throughfares east and west through the city, and the block in which the present properties were located was directly opposite the large school tract of the former State Normal and Model Schools, and the present city Grant School. The surrounding neighborhood toward East State and Clinton Streets is a high class neighborhood, containing the Swamp Angel war memorial, churches, apartment houses, schools and school dormitories, the Masonic Temple, the Mt. Carmel Guild, and the Y. M. C. A. building. In the same block with Nos. 616 and 618 there had been previously business stores, doctors' residences and offices, and other like buildings, but following the announcement of the Coalport project in 1954, there had been a general deterioration and lack of upkeep as stated.

Under those circumstances the owners contended that the real value of their property should be considered from the point of view of conditions as they existed at the time of the announcement, but their contention was overruled by the Court, and the value of the property as of September 29, 1958, when the Complaint was filed, was the standard adhered to, and the view by the jury in June 1959 was what they carried with them to the jury room. Objection to the ruling was also noted.

In fixing his value of the property taken, Mr. Bradley, though admitting lack of construction qualifications, testified that he valued the building on No. 616 at $7,000.00, and that it was in very poor condition. He valued the building on No. 618 which was in excellent condition, at $11,650. He then testified that, in his opinion, the properties as a whole had a value of $22,400,00, and that that was their fair market value as of September 29, 1958. He also referred to several sales in the near vicinity which he felt were comparable, and which are discussed supra.

When, however, the owners produced the witnesses McCarthy, DiNola, and Bachman, they were not permitted to show the separate value of the buildings and the land, but were confined to the statement of the value which in their judgment a willing buyer would pay and a willing seller would sell for, and were not permitted to show how they reached that conclusion. And Mr. DiNola, governed by that ruling, was only permitted to describe the condition of the buildings, and not to express a construction expert's opinion as to buildings value. Appropriate objection was also noted to this ruling.

Regardless of that, however, it should be noted that as against the testimony of Mr. Bradley, fixing an over-all value of $22,400.00, was the testimony of Mr. McCarthy, $68,578.00, and Mr. Bachman, $55,000.00, both real estate brokers of long experience and Mr. McCarthy a building construction operator of wide experience, to the effect that the properties had an overall value greatly in excess of Mr. Bradley's figure; and Mr. DiNola, also a construction expert of long experience, testified as to the fine condition of No. 618 and the slight expense involved in restoring No. 616. Mr. Maurice Finkle and Mr. Nathan Finkle both testified as to the fine condition of No. 618. This testimony was not rebutted, and these witnesses were in no wise impeached. There is no testimony in the record fixing $26,000. as the value of the property taken. It seems clear, therefore, that the jury entirely disregarded the evidence and jumped to a valuation having no basis in the proofs. That this should have been sufficient to warrant the trial Court

in setting aside the verdict and directing a new trial, seems to be in accord with the established authorities, and in failing to do so, it is respectfully submitted he erred. And that there was no sustainable basis for the jury's verdict, seems obvious.

It is also respectfully urged that the Court below erred in limiting the date of the fixing of the value of the property at September 29, 1958, the date of filing the Complaint, in view of the fact that at least four years prior thereto announcement was made of the project and there was a stampede from the condemned area with an accompanying depreciation of business, occupation, maintenance, and general improvement and upkeep of the area, resulting naturally in a picture which in 1958 and a jury's view of the subject premises and surrounding area in June, 1959 could not compare with that of 1954.

An appropriate request to charge thereto was made by the defendants (D219a-14-25). Upon the Court's failure to charge this request an appropriate objection was made (D215a-6-22).

In addition thereto the equitable doctrine, now available for application in the Law Division, should have been applied permitting the jury to visualize the situation as of the time the Housing Authority announced its intention to demolish the area, which could have been shown clearly by the evidence of those familiar with it. Defendants' specific request to charge to that effect was refused. Appropriate objection was noted.

In this respect, too, the jury were encouraged, in the view that they were the sole judges of the evidence and by their view and their own estimate of the testimony they could find the value regardless of the weight of the evidence. Though there was no specific objection noted to this, it comes clearly within the plain error rule, R. R. 1:5-3(c).

Dedendants also contended, and requested the Court to charge, that the loss of business and interference with business profits, was an element to be taken into account in determining the amount of the award. This, however, was also refused, and an appropriate objection noted.

The analysis of the testimony of the several witnesses has been above stated, and a further review thereof would be unduly repetitious and unwarranted. But it sems irrefutable that, in the light of the testimony of defendants' witnesses, who stand unimpeached, and the general situation shown by the evidence, just compensation has not been awarded the owners for what is being taken away from them in this action, and that if the judgment under review on this appeal is permitted to stand, the owners-defendants thereby, and by the rulings and findings adverse to them, have been denied Due Process of Law, the Equal Protection of the Laws, and, since Magna Charta, (Runnymede, 1215,) their property and the possession, use and enjoyment thereof wrested from them, in violation of the Law of the Land; —and an "American's house is no longer his castle."

And to avoid unduly prolonging the argument and burdening it with unwarranted prolixity, it is respectfully submitted that, in each of the points raised in the 11 Questions Involved the Court erred, to the manifest injury of the defendants and in contravention of their fundamental legal and constitutional rights aforesaid.

Conclusion

It is respectfully submitted, therefore, that the judgment under review should be reversed, and that the record be remitted for further appropriate proceedings, with costs.

Respectfully submitted,

JOHN A. HARTPENCE,
Attorneys for Defendants-Appellants.

PETITIONERS' (APPELLANTS') PETITION FOR CERTIFICATION IN SUPREME COURT OF NEW JERSEY

Statement of Questions Involved

1. As stated at page 1 of Main Brief of defendants in the Appellate Division.

2. Did not the Appellate Division err in affirming the judgment of the Law Division, for the reasons assigned in the Petition?

3. Did not the Appellate Division err in refusing to sustain the contentions of defendants and reverse the judgments under review, and remand the cause with the direction to grant a new trial?

4. Should not certification be granted in order to afford defendants a full opportunity to formally argue their plea for reversal, especially in view of the constitutional questions involved and presented by the record?

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of New Jersey:

Your Petitioners, Maurice A. Finkle, Executor of the Last Will and Testament of Isaac Finkle, deceased, Maurice A. Finkle and Katharyn H. Finkle, his wife, Nathan N. Finkle and Bess P. Finkle, his wife, Lester J. Finkle and Bessie H. Finkle, his wife, Bessie E. Lubin, Maurice R. Block, Carolyn Lavine and Talbert Lavine, her husband, S. Lester Block and Ruth Block, his wife, Defendants-Appellants, respectfully show:

Statement of the Matter Presented

This is an application by the above-named Defendants-Appellants, (designated herein as Defendants) for certification to the Superior Court, Appellate Division, to review the Judgment of that Court affirming the judgment of the Law Division, Mercer County, on appeal by the above-named Plaintiff-Appellant, (designated herein as Plaintiff) from the Award of Commissioners, with cross-appeals by defendants in eminent domain proceedings involving the taking by plaintiff of two contiguous properties of defendants located at No. 616 and No. 618 Perry Street, in the City of Trenton, Mercer County, New Jersey. The Commissioners awarded defendants $12,800.00 for No. 616 and $30,000.00 for No. 618, a total of $43,100.00 for the two properties. Upon the trial of the appeal the actions were consolidated, and the jury rendered its verdict awarding the defendants $26,000.00 for the combined properties, for which judgment was entered accordingly. From that judgment appeal was taken by defendants to the Appellate Division, which heard the argument thereon, sitting at Newark, on March 22, 1960, and on July 5, 1960, rendered its judgment affirming the judgment of the Law Division aforesaid. To review that judgment this petition is respectfully submitted by defendants. The opinion of the Appellate Division not yet reported, is herein appended at page 1a in compliance with the rule.

A more detailed outline of the facts is stated at pages 2, 3, and 4 of the main briefs of each of the parties, respectively, in the Appellate Division, which are filed herewith in accordance with the rule, together with the Appendix. And the position of defendants and their arguments and contentions are so fully stated in their main and reply briefs in the Appellate Division that it would seem unwarranted to repeat them here in detail, and for the Court's convenience they beg to incorporate them by reference accordingly, together with such additional observations and references as may be applicable and appropriate, and a review of the opinion and judgment of the Appellate Division.

In emphasizing and supplementing the same, therefore, it is respectfully submitted that the Appellate Division erred in determining adversely the contentions of defendants as urged point by point in their briefs and arguments, and in other respects to which specific reference will be made, and in affirming the judgment of the Law Division, and that certification should be granted, to the end that full opportunity be afforded defendants to be heard and to present to this Honorable Court formally and at length their position respecting what they regard as a denial of their basic legal rights, and particularly as a denial of their fundamental constitutional rights and privileges, which in itself vests them with the clear right of appeal and review.

The salient points, supplementing and emphasizing the aforesaid, upon which defendants respectfully urge the granting of their petition, are:

POINT I

The Appellate Division erred in denying defendants' contention that a new trial should have been granted.

It is respectfully submitted that the Appellate Division, in its Opinion, erred in a number of vital respects in its analysis of the testimony and its concept and review of the record, and that its conclusions cannot be sustained.

A. In stating that Mr. Bradley, Plaintiff's only witness, "did not value the land and the buildings separately."

The attention of the Court is directed to (D42a 14-17), (D50a 10-14), and to the analysis set forth in (DB 10-40 to 11-4), where it distinctly is demonstrated to the contrary. This is also discussed fully at pages 32 to 38 of our main brief and pages 6, paragraph (2), to 9 of our reply brief.

Further unequivocal confirmation of the fact that Mr. Bradley valued the buildings at 616 and 618 Perry Street, separately from the land may be deduced from his testimony, to which specific reference is made in (DB 9-16 to 10-9) wherein the $2.80 per square foot figure was the result on the well-constructed brick building at 618 and containing fine living quarters, as compared with the identical figure of $2.80 per square foot for the frame building at 616, which Mr. Bradley stated was in poor condition.

The Appellate Division stated "He figured 616 alone worth $7,000 and 618 alone $11,650, or a total of $18,650, but as a unit he was of the opinion the total market value would be approximately 20% greater, or $22,400". It is, thus, respectfully submitted that the $22,400 figure given by Mr. Bradley totally ignored the value of the land.

It should also be noted, that although Mr. Bradley based his value solely on the value of the building, he admitted that he was not "competent to testify as to the cost of construction because I am not a builder". (D51a-12).

B. In commenting that "Here the buildings were not originally designed for the commercial purposes to which they had been adapted."

It is respectfully urged that the subject premises were originally built as a store on the first floor, residence above, and that this is borne out even by the testimony of Mr. Bradley when he testified as set forth in (D46a 32-36), (DB10 15-17).

C. In stating that "no owner or buyer would reconstruct these buildings—even the Finkles themselves. The buildings here had not—been designed by an owner who wanted them that way and would rebuild them."

The Finkles gave no testimony in the case to this effect, nor was there any testimony given at the trial upon which to base this statement.

D. In making reference to 616 Perry Street, wherein the apartment was stated to be in disrepair.

An explanation of this disrepair, however, had been given in the uncontradicted testimony of Mr. Maurice A. Finkle, who stated that a member of the Housing Authority, (plaintiff in this action) told the tenant to move—long prior to the commencement of the condemnation proceedings. (D170a 16 to 20).

Furthermore, only slight alterations would have been necessary to have had the building at 616 in good repair. (DB 19 15-17) (D114a 3-30).

The Appellate Division stated that the court thereupon ruled that because of the age of the "buildings, and their nature, condition and use, he would not permit such testimony". In view of the excellent condition in which 618 Perry Street was maintained particularly, it is contended that the age of the building was not such as to bar the application of the rule permitting reproduction cost less depreciation.

The court in its opinion stated that the "buildings are old, obsolete". There is no evidence upon which to base this conclusion. On the contrary, the evidence shows that 618 Perry Street was in excellent condition and that 616 Perry Street required but minor repairs to put it in very good condition as before stated, and the apartment at 616 Perry Street was tenantless because the Authority had told the tenant to move.

E. In commenting that "Bradley was not asked and did not testify how much he estimated the rental value to be, nor did he state the total amount of the 'taxes, insurance, water rent, maintenance, management charges', which would have to be deducted from the rental income to leave a net of $2,000, $2200", the Appellate Division evidently implied a failure of proof chargeable to the Defendants.

It is respectfully submitted that this gap in Mr. Bradley's testimony is fatal to Plaintiff, which, if it intended to rely on rental value, certainly should have elicited such data from its only witness; it was not the obligation of Defendants to develop the Plaintiff's case.

Mr. Bradley testified that the barber shop brought a rental of $65 per month (D53a 28) and had a frontage of 14 feet (D52a 24) and a depth of about 24 to 25 feet (D52a 36). Thus, the barber shop had an external area of approximately 350 square feet and the yearly rental of $780 on the barber shop at 620 Perry Street amounted to $2.23 per square foot. This Honorable Court's attention is directed to a discussion of these matters at (DB 8 10-20).

He further testified that the cigar store at 622 Perry Street rented for $65 per month (D45a 34; D54a 4) and had a lot frontage of 18 feet (D52a 25 & 26) and a depth of 23 feet (D53a 7). Allowing for walls, this square foot area would be less than 350 square feet.

The annual rental of $780 again amounted to $2.23 per square foot.

The Finkle stores had an open area of 2968 square feet, comprising 1225 square feet on the 616 part (D120a 22) and 1743 square feet on the 618 side (D120a 31).

Thus, if Mr. Bradley had been asked by Plaintiff the rental value of the Finkle stores having an area more than 4 times the total store area of 620 and 622 Perry Street, and if he were to be consistent, his testimony as to rental value of the store at 616-618 would have required him to set a rental figure greater than that even testified to by defendants' witness, Mr. Bachman (DB 15 2-8).

It should be noted, moreover, that rental value is not the determining factor but is simply one element to be considered in fixing value.

Plaintiff's counsel, Arthur Kelsey, attempted to cover this serious gap in Mr. Bradley's testimony:

In his summation to the Jury, Mr. Kelsey began by explaining that he was reading from prepared notes in order to give an "accurate" presentation of the testimony (D196a 31-38).

He then "quoted" Mr. Bradley as follows: "Certainly I can justify a $22,000 figure by income because it will bring an investor 9%. $2116 on this property, an income, a net return on this property will not be hard to find. I can justify it and an investor can get it. 9% is reasonable. $22,000 is a reasonable price to get that kind of a return." (D203a 32-38).

It is respectfully submitted that Mr. Bradley gave no such testimony, and the misleading of the jury in this respect was calculated to and very likely did redound to the prejudice of Defendants.

F. In finding that "Defendants now say they wanted McCarthy to give his separate valuation of the land and the buildings 'to show the bases upon which he reached that opinion' that the properties were worth $68,578. However, defendants did not advance this ground for the admission of the testimony to the court below."

However, it is respectfully submitted, that the defendants did, in fact, advance this ground, but the court ruled

against them in their efforts, (D70a 26-28) (D72a-6-8), and thereupon counsel deferred to the Court's ruling, in accordance with counsel's understanding of dignified trial etiquette.

G. In holding that Mr. Bradley testified: "on the rentals now being paid and being paid over a period of years for this type of property in that block, an investor-purchaser should be able to derive a net return of between 8 and 9% after paying all operating costs..." or "... something around $2,000, $2200."

It is respectfully submitted that the Appellate Division erred in concluding that Mr. Bradley placed a net return on subject premises at between $2000 and $2200.

The first part of the quotation referred to by the Appellate Division is found at (D51a 29-32). The latter part of the quotation—namely, "or something around $2000-2200", is at (D58a 14) and bears no reference to the first quotation. His answer of $2000-$2200, was arrived at when he said "nine times $22,400 in my head would be something around $2000-$2200", and could not have been interpreted as net return.

H. In view of the review of the testimony of Mr. Bradley in Paragraphs E and F aforesaid, and the analysis of his testimony as set forth at (DB 8-20 to DB 9-7), (DB 9-15 to DB 11-38), (DB 5-10 through DB 11-38), it is respectfully submitted that its inconsistent, confusing and untenable nature is such as to lack probative value.

Whereas the contrasting quality of testimony offered on behalf of defendants, as set forth in DB 11-38 to DB 23 end of page, is such that the jury, by mistake, prejudice, lack of due consideration or comprehension, or by way of compromise, entirely disregarded the competent testimony, and picked their verdict out of the air, constituting "a palpable perversion of the jury function," and resulting in "a manifest denial of justice" to defendants, which not only warrants and justifies setting the verdict aside and granting a new trial, but which should render such action vitally essential to justice and due process of law.

The reference to the discussion with counsel respecting the anticipated testimony of the witness McCarthy should have no bearing adverse to defendants. It was the function of the witness to testify, not the function of counsel to atempt to state the expectable testimony of an expert nor to limit or qualify it in advance by a general outline of it which the witness would be required to adhere to.

> "An *inference* is something inferred from precedent matter; separated from which, it is a mere absurdity in language. There may be precedent matter, and no inference; but there can be no inference without precedent matter; they must stand together and cannot be separated; * * * an inference, taken alone, is a mere absurdity." *Chambers* v. *Hunt*, 18 N. J. L. 339, at 354-5 (Sup. Ct. 1841).

With regard to the binding effect of the evidence and the power and duty of the Court respecting a verdict which palpably is not in accord with it, in addition to our discussion on pages 22 and 23 in our main brief, we desire to call the Court's attention to the following applicable authorities:

> *Juliano* v. *Abeles, et al.*, 114 N. J. Law 510, 177 Atl. 666 (Sup. Ct. 1935).
>
> (Atl. Syl. 8) "Where case exhibits compromise verdict on fundamental issue of liability, the error taints the whole verdict, and a new trial of entire issue is required (Supreme Court Rules, 122, 123)."

Approved in,

> *Bowen* v. *Healey's, Inc.*, 16 N. J. Misc. 113, 197 Atl. 655 (Sup. Ct. 1938).
> (Atl. Syl. 2) "A verdict unsupported by any credible evidence must be set aside on application for a new trial."
>
> (Atl. Syl. 4) "A verdict plainly exhibiting compromise conclusion relative to the fundamental issue of liability must be set aside on application for a new trial."

Barry v. *P. R. R. Co.*, 65 N. J. Law 407, 47 Atl. 464 (Sup. Ct. 1900).

(Atl. Syl. 2) "Where it appears that the jury, in reaching its result in a cause, must have disregarded the whole range of the medical or other testimony of the plaintiff or defendant, notwithstanding the credibility of the witnesses stands unimpeached, and that their testimony can be reconciled with the other evidence in the cause, this of itself is ground for a new trial."

See, also,

21 West's N. J. Digest, "*New Trial*," pp. 262-265, citing, among others, numerous cases sustaining the principle that—

"When a verdict is clearly against the weight of the evidence, it is the duty of the trial court to set it aside and award a new trial."

The *Juliano* case is followed in—

Fisch v. *Manger*, 24 N. J. 66, at page 79 (1957), where Justice Jacobs, reversing a judgment of the Court below where there had been a denial of a motion for a new trial, stated that,—

"On appeal, this court, in an opinion by Justice Ackerson, approvingly cited Gaffney v. Illingsworth, supra, (90 N. J. L. 490, 492 E. & A. 1917), which held that "in the case before it the new trial should not have been limited to damages because the original jury verdict appeared to represent a compromise finding on the issue of liability. See Hendrickson v. Koppers Co., Inc., 11 N. J. 600, 608 (1953); Juliano v. Abeles, 114 N. J. L. 510 (Sup. Ct. 1935); Dahle v. Goodheer, 38 N. J. Super. 210 (App. Div. 1955); certiorari denied 20 N. J. 534 (1956)."

* * *

And, at page 80,—

"Notwithstanding earlier doubts (Nelson v. Eastern Air Lines, Inc., 128 N. J. L. 46, 55 (E. & A. 1941),

there is now no question as to the power of our appellate courts to reverse a trial court's refusal to grant a new trial (whether or not conditioned on *remittitur* or *additur*) where it is satisfied that there has been 'an abuse of discretion,' (Esposito v. Lazar, supra, 2 N. J. 257, 259 (1949)); Elvin v. Public Service Coordinated Transport, supra, (4 N. J. Super. 491, 494 (App. Div. 1949)); or, in the more modern terminology, 'a manifest denial of justice.' See. Lindroth v. Christ Hospital, 21 N. J. 588, 596 (1956); Conklin v. Miele's Motor Transportation, Inc., 43 N. J. Super. 420, 428 (App. Div. 1937)."

Fisch v. *Manger* is followed in—

Pawlowski v. *Mariano*, 59 N. J. Super. 511, at 517 (App. Div. 1960) where Judge Freund, citing also *Annichiarico* v. *Mobilite, Inc.*, 19 N. J. Super. 492, 497 (App. Div. 1952), said,—

"Appellate disturbance of the trial result is not only permissible but required where the verdict 'constitutes a palpable perversion of the jury function.' Hager v. Weber, supra, 7 N. J. at page 210."

Fisch v. *Manger* cited with approval in—

Rossetti v. *Public Service Coordinated Transport*, 53 N. N. Super. 293 at 297 (App. Div. 1958), (Syl. 6 p. 294) Failure to object does not deprive Court of authority to direct a new trial. R. R. 1:5-3 (c) 2:5, 4:5-10 (b), 4:61-4, 4:63-1, 4:63-2.

and at p. 300 Judge Hall states that—

"Appellants also argue that plaintiff cannot object to any error in the court's comments because of the failure of their attorney to object at the time. However, the failure to make timely and adequate objection does not deprive the trial judge of the authority, in the exercise of his judicial discretion as above defined, to order a new trial. A trial court may, even on its own initiative, order a new trial

(R. R. 4:61-4) whenever it feels that substantial, even though unnoticed, error had been committed (R. R. 4:63-2), on the same basis as an appellate court will note plain error (R. R. 1:5-3(c). 2:5; in re Stern, supra (11 N. J. 584, 1935)."

"In awarding damages for the injurious consequences of personal torts, and likewise in assessing punitive damages, a jury may properly give consideration to the presently greatly depreciated purchasing power of the dollar." (cases cited).

Cabakov v. *Thatcher*, 37 N. J. Super. 249, at 258 (App. Div. 1955).

And that deflated value of the dollar is also clearly reflected in the obviously increased cost of production and construction, with a corresponding increase in the market value figure in fixing sale price of all commodities and structures. $26,000 today will hardly build a bungalow. And the Finkle buildings, especially in view of the super-excellent condition of No. 618 could not be replaced for 3 times the amount awarded by the jury, and in *Bowes* v. *Public Service Ry. Co.*, 94 N. J. L. 378, at 379, (Sup. Ct. 1920), Justice Minturn, speaking for the Supreme Court, said:

"At a period when the purchasing power of the dollar has in the language of the day been 'cut in half,' the value of the sum awarded here is not to be estimated in the numerical quantum of the recompense, but in its comparative ability to furnish the necessities of life. Of these facts the court *must* take judicial notice." (Emphasis ours.)

Hannon v. *D. L. & W. R. R. Co.*, 98 N. J. L. 191, at 195 (E. & A. 1922).

"Damage which a party sustains and seeks to recover, if found and assessed, is expressed in the currency of the country. It is the standard by which damage is measured, and the amount is properly governed by its relative purchasing power in satisfaction of the injury sustained."

POINT II

Supplementing our main brief at pages 3 and 24 to 32 and our reply brief at pages 2 to 5, we desire to emphasize the case of *State* v. *Jones*, 27 N. J. 257, 142 Atl. 2d, 232 (1958), where Mr. Justice Jacobs, at pages 261-264 of the Supreme Court report, pages 234-236 of the Atlantic 2, states clearly the rule that should prevail in the precise situation in the present proceedings. There, at page 262 of the Supreme Court report, the pith of the rule is stated to be that,—

> "If, after the taking and before the condemnation action, the property is reduced in value because of alterations by the Commissioner or otherwise, the condemnee would justly be entitled to the higher valuation as of the date of taking; this is the view which prevails generally throughout the country (3 Nichols, Eminent Domain §8.5(1) (3d ed. 1950), and it may well be compelled by the constitutional guaranty of just compensation."

And further, at page 263, that,—

> "The respondents suggest that the foregoing views may be applicable in equity but not at law, and they cite Doremus v. Mayor, etc., of City of Paterson, 73 N. J. Eq. 474, 501 (Ch. 1908), and Trimmer v. Pennsylvania P. & B. Railroad Company, 55 N. J. L. 46, 49 (Sup. Ct. 1892). In view of the changes wrought by our 1947 Constitution the suggested distinction has lost whatever force it may have had; and while R. S. 20:1-9 does refer to the fixing of compensation as of the date of the filing of the condemnation petition (now complaint—R. R. 4:92-1) it would seem that, in the light of the constitutional provision for just compensation, the introductory portion of R. S. 20:1-1, and the terms of R. S. 27:7-22, it may fairly be considered as not controlling where there has been a taking prior to the condemnation action and an intervening change in the condition of the property."

And while it was held in the *Jones* case that there had not been a prior taking, still in the present case under review

there clearly was a prior taking as early as 1954 or 1955, accompanied by a devastation and abandonment of the area and consequent depreciation in values and ceasing of residential and business activities when the complaints were filed on September 29, 1958, as discussed fully in our main and reply briefs as above specifically paged. And attention is also called to the eminent domain statute which is applicable, *N. J. S. A. 20:1-9, 1959 Pocket Supplement* p. 13, which provides:

> "20:1-9. The commissioners shall take and subscribe an oath faithfully and impartially to examine the matter in question and make a true report according to the best of their skill and understanding. Thereafter they shall meet at the time and place appointed and proceed to view and examine the land or other property and make a just and equitable appraisement of the value of the same, and an assessment of the amount to be paid by the plaintiff for the land or other property and damages as aforesaid, as of the date of the commencement of the action for condemnation. As amended L. 1953, c. 20, p. 363, § 18."

See, also, 1947 Constitution of N. J., Art. 6, Sec. III, Par. 4, N. J. S. A. "Constitution," p. 549, which provides that,—

> "Subject to rules of the Supreme Court, the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief shall be granted in any cause so that all matters in controversy between the parties may be completely determined."

> "It is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned."

> *Broom's* Legal Maxims, (9th ed). p. 199.

Plaintiff should not be permitted to profit or obtain an advantage by its own delay.

POINT III

This is discussed fully at pages 32 to 38 of the main brief and pages 6(2) to 9 of the reply brief, and *supra* under Point I of this petition.

It clearly denies equal protection of the laws and due process of law, which Constitutional prohibitions are applicable to the judicial as well as the legislative and executive branches of the State. See McGehee, "Due Process of Law," pages 26-27, where it is stated that—

> "Whoever * * * acts in the name of and for the State, and is clothed with the State's power, his act is that of the State."

Points IV to XI in our main brief and as set forth in our reply brief relatively have been given no detailed discussion in the Appellate Division's opinion, but we again respectfully re-emphasize them here, as outlined as follows:

POINT IV

See main brief pages 38-39, and reply brief page 6, Point III(1), also discussed in Point I *supra*.

POINT V

See main brief page 39, and reply brief page 10(7). Also Point II, *supra*.

POINT VI

See main brief page 40, lines 1 to 25, and reply brief page 11, lines 1 to 12.

POINT VII

See main brief pages 40-42. Moving out of area destroyed defendant's business.

POINT VIII

See main brief pp. 42-46, reply brief pp. 9(4)—10.

POINT IX

See main brief pages 47-48, reply brief page 10(5).

POINT X

See main brief pages 48-49, reply brief page 9(3).

POINT XI

See main brief pages 50-51, lines 1 to 15, reply brief p. 11, lines 15 to 20.

POINT XII

Constitutional points and summation

See main brief pages 51 to 56, reply brief pages 11-12, etc.

The over-all view discloses a clear antagonistic attitude to the constitutional rights of defendants, and an unwarranted adherence to technical procedure and absence of equitable attitude. Due process of law and equal protec-

tion of the laws have been palpably denied defendants and just compensation ignored.

Conclusion

It is urged that the record clearly states a situation which justifies and merits certification within the spirit and letter of the Court's rules 1:10-1A (b) (1), (2), (3) 1:10-2 and 1:10-3, pertaining to certification, and particularly in view of the constitutional rights and privileges of defendants involved, which in itself should give the clear right to review by this Honorable Court.

In Conclusion, therefore, it is respectfully requested in behalf of defendants that certification be granted, to the end that the opportunity be afforded to present the over-all situation here involved and to discuss fully the specific points which go to make up that over-all situation.

Respectfully submitted,

JOHN A. HARTPENCE
Attorney for Defendants-Petitioners.

I hereby certify that the foregoing petition presents substantial questions meriting certification, and that it is filed in good faith and not for purposes of delay.

JOHN A. HARTPENCE
Of Counsel for Defendants-Petitioners.